(1)

88-544

No. .....

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

T. DEWEY HARDEN, JR.

Petitioner,

v.

ROBERT M. PAUL, J. WYATT GRIMMER,
MARJORIE C. KIRKLAND, WILLIAM T. THORNTON,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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August 22, 1988

QUESTIONS PRESENTED

I. WERE HARDEN'S DUE PROCESS RIGHTS DENIED WHEN HE WAS TERMINATED AS A TENURED PROFESSOR AND THEREAFTER GRANTED A HEARING BEFORE A PURELY ADVISORY COMMITTEE?

II. WERE HARDEN'S FIRST AMMENDMENT RIGHTS VIOLATED WHEN HE WAS TERMINATED AS A TENURED PROFESSOR FOR, AS PRESIDENT OF A FACULTY UNION, WRITING A LETTER TO HIS UNION MEMBERS URGING COLLECTIVE EFFORT TO ADDRESS FACULTY CONCERNS?

II.

LIST OF ALL PARTIES

T. DEWEY HARDEN, JR.
TROY STATE UNIVERSITY

RALPH W. ADAMS

ROBERT M. PAUL

J. WYATT GRIMMER

WILLIAM T. THORNTON

MARJORIE C. KIRKLAND

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, T.Dewey Harden, Jr. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United states Court of Appeals for the Eleventh Circuit entered in this proceeding on April 6, 1988.

OPINIONS BELOW

The opinion of the court of Appeals, reported as *Harden v. Adams*, 841 F. 2d 1091 (11th Cir. 1988), appears in the Appendix hereto along with the separate judgment of that court. The order and opinion of the District court for the Middle district of Alabama bearing the caption *Harden v. Paul* are also included in the Appendix. The district court's order was appealed to and affirmed by the Eleventh Circuit.

JURISDICTION

The judgment and opinion of the court of Appeals for the Eleventh Circuit were entered on April 6, 1988. A timely petition for rehearing *en banc* was denied on May 24, 1988, and a copy of such order is also included in the Appendix. This Petition for Certiorari was filed within 90 days of that date. The court's jurdisction is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United states provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth ammendment to the Constitution of the United States provides in part:

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 1983 of Title 42 of the United states code provides in part:

> Every person who, under color of statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurdisction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

T. Dewey Harden, Jr, a former tenured teacher at Troy State University Dothan/Ft. Rucker was notified in writing on May 6, 1982, of his termination from the faculty effective June 30, 1982. Harden requested a hearing and when no notice concerning a hearing was received, he filed a complaint in the United States District Court for the Middle District of Alabama, on June 17, 1982. He was thereafter granted a hearing before the Faculty Personnel Advisory Committee of Troy State University. Said committee is a purely advisory committee and had no authority to reverse respondent Paul's termination of Harden.

Harden's dismissal was approved by the committee, and Harden pursued his suit in the United States District Court for the Middle District of Alabama claiming violation of his rights to freedom of expression and due process under 42 U.S.C. Section 1983. The district court entered summary judgments for each of the defendants on all grounds. The Eleventh Circuit reversed as to the petitioners in their individual capacity.

Harden's First Ammendment and Due Process Claims were tried before the District Court begining on January 5, 1987. On March 18, 1988 the District Court ruled against Harden on all counts. The Eleventh Circuit Court of Appeals affirmed the District Court's opinion on April 6, 1988.

II. STATEMENT OF RELEVANT FACTS

Petitioner (hereinafter referred to as Harden) at the time of his termination, had been employed by Troy State University for twelve (12) years and possessed tenure (R. 8-9) as a twelve month employee (R. 9-21). He has a PhD. from the University of Mississippi (R. 8-10).

Harden was instrumental in organizating a local organization of the Alabama Education Association/National Education Association at the Dothan/Ft. Rucker branch of the University (R. 8-21; R. 8-5) and was elected president of the organization serving as such until his termination. (R. 8-21).

The Alabama Education Association (hereinafter AEA) represented faculty members' concerns in the areas of teaching loads, tenure and promotion policies, health and life insurance coverage, retirement programs, future changes in academic policy, the rights of faculty to request redress of grievances, and in general to help AEA members do their professional jobs. (R. 8-8 and 17). In addition, since Troy State University has limited restraints on their expenditure of public funds, AEA works closely with its members in the area of the college budgetary process. (R. 8-15 through 16)

Shortly after Harden organized the local AEA group, the vice president of the branch campus (respondent Robert Paul), began to act toward Harden in a hostile manner. (PX 368 Vol. 4 pg. 154)[1] Paul informed Harden that he could not have AEA meetings in his own home and that he (Paul) had Harden's AEA meeting notices under lock and key. (R. 9-121) Paul concluded the above conversation with a threat to fire Harden. (R. 9-124; PX 368 v. 4 pp. 151-152) Additionally, when Harden inquired as AEA president concerning the procedures used by the Dothan/Ft. rucker branch in the changing of teachers' contracts, Paul threatened to fire him. (PX 368 v. 9 p. 77-80)

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[1]PX is designation for Plaintiff's Exhibits, DX is for Defendants' Exhibits.

During the time that Harden was president of AEA, he met frequently with the college's chief administrative officers to address such issues as faculty pay raises, tenure concerns, and faculty input into the drafting of a faculty handbook. (R. 8-21) His efforts met with minimal success. (R. 8-24 & 25)

While the trial court did issue from the bench a finding of fact that Harden has been aggressive in carrying out his duties as AEA president (R. 12-142), a sampling of his efforts shows that: (1) he attempted to provide some connecting link between the faculty and the administration to open discussion about the concerns of faculty members (R. 12-140); (2) he assisted in the completion of a faculty Opinion Survey (R. 12-144); (3) he prepared and secured faculty signatures on a petition seeking faculty input on drafting a faculty handbook (R. 9-119 through 120 and PX 282); (4) he held frequent AEA meetings and sent out detailed notices as to the agenda to be covered at those meetings (R. 9-120 and PXs 284-A, 284-B, and 236); and he provided AEA members with information showing the increased funding received by Troy State University from the Alabama legislature. (R. 9-118)

At some point, Harden began to realize that his efforts to work internally were not producing results. (R. 9-95) He than began to provide information to the local news media that was always supported by documentation. (R. 9-91 & 92) The administration of the Dothan/Ft. Rucker branch knew that Harden was the source of the information prior to their terminating him. The branch campus hired the reporter who has written many of the articles and that reporter informed them that Harden has been the source of the newspaper's information. (PX 368 v. 3 p. 77-78) Prior to hiring the newspaper reporter, the University has made an effort to determine which faculty member has been providing information to the news media. In addition, Harden was quoted in many of the news articles. (R. 9-23)

On or about June 25, 1981, Dr. Ralph Adams, (president of the troy State University System) was notified that the National Council of Accreditation for Teacher Education (hereinafter

NCATE) has denied Troy State's Teacher education Program its certification. (PX 145) A copy of this letter was slipped under the door to Harden's office some time later. (R. 9-3 & 4)

By way of a brief explanation, NCATE is an independent body which makes an extensive on site review of any college or university's Teacher Education Program seeking its (NCATE's) certification of that program. (R. 8-225) If a graduate in education has graduated from an NCATE accredited institution, they are able to get certification to teach in public schools in all states much easier than if they had not graduated from an NCATE certified institution. (R. 8-224 through 226)

Almost two (2) months later, a local newspaper (the Dothan Eagle) revealed the denial of NCATE certification in an august 20, 1981 news story. (R. 14-146 and Px 147) Neither the respondent Paul, who was the branch president for the Dothan/Ft. Rucker branch nor respondent Grimmer, its vice-president for asademic affairs knew of the loss or denial of NCATE certification until the August 20, 1981 article appeared. (R. 14-182; R. 13-81; R. 13-214 and PX 368 v. 1 p. 30)

It is undisputed that Harden revealed the loss of NCATE certification to the *Dothan Eagle* by delivering to the paper a copy of the June 25 letter from NCATE to Adams. It is also undisputed that he has typed on strips of paper a column entitled "Faculty Comments", and that these strips of paper were scotch taped to the left hand side of the NCATE letter over numbers that were a reference to NCATE standards. (R. 8-222; PX 145; R. 10-219)

Harden's comments were drafted by him after consulting with other members of the faculty (PX 368 v. 8 p. 65 and v. 5 p. 78-79) and were in large measure comments critical of the way that Troy State University has approached and botched its efforts to gain NCATE certification. Harden has served on several internal college committees working on securing NCATE accreditation or certification, and was familiar with NCATE's standards for certification. (R. 8-237 through 241; R. 11-179 through 182; R. 8-226 through 237; R. 8-224)

Shorlty after the NCATE article appeared in the *Dothan Eagle* other Alabama newspapers began to cover the story of its loss and/or problems at Troy State University. (R. 141) The *Montgomery Advertiser* covered the story (R. 9-135 and PX 135) and expressed an opinion of the issue on its editorial page, (R. 9-145 PX 222) which commented on the fact that Mr. Paul had stated it was too expensive to do what NCATE required to gain certification and yet the college could afford to maintain a luxury yacht. Not only did the *Montgomery Advertiser* and *Dothan eagle* carry the story, it was also covered by the *Birmingham News*. (R. 9-140 and PX 224)

During this period of time, a group of faculty members at the Dothan/Ft. Rucker branch determined that it would be beneficial to determine the opinions of the faculty relative to problems at the college. (R. 12-144 through 146)

Mr. Paul Stark, a marketing professor, developed a questionnaire or survey instrument and sent it out to all members of the faculty of the Dothan/Ft. Rucker Campus. (R. 12-144; PX 26)

Approximately ninety (90) percent of the faculty completed and returned the survey forms. (R. 12-157) The forms were collected by Mr. Stark but were not opened until all were tabulated at a meeting to which the local news media has been invited as well as the administration of the college. (R. 12-149 and 151; PX 26) The tabulated results (not individual responses) were then provided to the administration and each faculty member. (R. 12-159) Harden participated in the tabulation of the results along with Mr. Stark and another professor. Shortly after the results were tabulated, they appeared in the *Dothan Eagle* .

At or about the time that the faculty opinion survey results appeared in the newspaper, respondent Thornton confronted the three (3) persons who had tabulated the survey and told Harden that if he could, he would fire him. (PX 368 v. 3 pg. 77) Thornton testified before the local hearing committee that he was of the opinion Harden should be fired because he was letting the newspapers have information and was publicity airing

problems at the college. (PX 368 v. 3 pg. 72 & 75)

During this same period of time (late summer and early fall of 1981) the respondents admited that they began to discuss the possible termination of Harden as a tensured faculty member for participation in surveys, and making problems of the college known to the public. (PX 68 v. 10 pg. 26-27 and v. 9 pg. 148 & 149, and v. 10 pg. 24; R. 14-98)

On March l, 1982, Harden signed, as AEA President, and mailed to AEA members at TSU/Dothan/Ft. Rucker the following letter:

> March 1, 1982
>
> To All Members of the TSU-D/FR AEA Chapter
>
> Meeting: Thursday, March 4, 1982 12:00-1:00 P. M.
> Community Room, Cherokee Branch of City National Bank
>
> After the faculty meeting last Friday, you should all be painfully aware that TSU-D/FR is at a major crossroad with respect to faculty-administration relations. We can either try to follow the SACS, NCATE, and SDE mandates for more faculty participation in academic decisions, or we can all go sit on our tail-ends in R(u)MPS (Robert Milton Paul Square) and accept what few crumbs the local administration will throw our way.
>
> Based on many of the administration's actions in the past, it is very probable that under the revised Faculty Handbook, we will come out on the short end with regard to teaching loads, tenure and promotion policies, health and life insurance coverage, university contribulations to TIAA retirement programs, future changes in academic policies, and the right of faculty members to request a redress of grievances. You all heard Buck Buchanan say in the meeting

Friday that the Faculty Personnel committee could only consider those matters specifically referred to it by Mr. Paul.

As of right now, the only hope for meaningful collective action is through our AEA chapter. WE must decide what course of action to take and act immediately or Mr. Paul's revised Faculty Handbook will be approved by the Board of Trustees. Once the changes are approved, out only alternatives will be to suffer in silence or get out.

In order to provide a stronger legal basis for our position, the attached proposal for amending the local AEA chapter's Constitution will establish the framework for the chapter to function as a collective bargaining unit for its members. Such a change could give badly needed protection to individual members through collective negotiations and the development of formal grievance procedures.

Please make every effort to attend the meeting. This may be our last chance to pull together as a faculty. If we fail now, we might just as well join the other pigeons in RMPS.

For a better TSU-D/FR,

T. Dewey Harden, Jr.
President

The letter was sent out primarily in response to concerns the faculty had over being advised that they would not be allowed any input into a revision of the faculty handbook. (PX 368 v. 5 pg. 71-72; R. 8-214 through 219)

At the local hearing, respondent Grimmer was aked by the University attorney to give his opinion as to why the March 1

letter was unprofessional and formented disharmony with the administration of the University. Grimmer answered that to him "the whole thing is unprofessional wording . . . addressing professional people, you would think a person would be on a higher level than his wording and then indicating that, you know, you are being treated so poorly by the administration you are being fed crumbs, this kind of thing. I just consider it - all of it - unprofessional, the wording as well as the contents." (PX 368 v. 2 pg. 67)

RuMPS square was/is a colloquial name adopted by many faculty members to refer to a small park or square the University built next to the Dothan College. (PX 368 v. 8 pg. 64) The square or park is officially named Robert Milton Paul Square and is named after defendant Robert Paul. The sending of this letter was a stated charge against Harden in Paul's letter terminating him delivered in May of 1982.)

In late April of 1982, Harden was overheard by respondent Paul, advising an AEA member that her 1982-83 contract of employment did not have to be immediately signed as demanded by Paul but could be reviewed and signed later. Paul shouted to Harden that he was not going to ever do that again (advise AEA members) here and that he (Harden) was not to talk to other faculty members. (PX 368 v. 5 pg. 75-77) Ten days later, Harden received a written notice of his termination effective June 30, 1982 stating twenty (20) reasons for the termination.

Harden did request a hearing. (PX 208) When on June 17, 1982 no response to the request for a hearing had been made by Troy State University, Harden filed suit. On the same day that the suit was filed, the University informed Harden by written notice that he would be given a hearing on June 30, 1982.

As has been mentioned previously, the defendants began discussing the termination of Harden immediately after the NCATE letter and the results of the faculty opinion survey were given to the press. On or about April 20, respondent Kirkland was instructed by Paul not to give Harden his contract for the

1982-83 academic year. Kirkland testified that she did not present Harden with a contract but instead gave it to Paul. (PX 368 v.10 pg. 7-10) Kirkland also testified that she did not fully complete Harden's performance evaluation in May of 1982 because he would not be employed after the spring of 1982. (R. 14-116) When asked by the trial court: "Well, you agree with him, then, that he was going to be terminated irrespective of a hearing, do You?" her response was: "Well, you see, that was my understanding in a meeting with Mr. Paul, Dr. Grimmer, Dr. Thornton and Dow Huskey around the first of May." (R. 14-117)

On June 15, 1982 (prior to a hearing even being granted) respondent Kirkland sent Harden a memo, with copies to respondents Paul and Grimmer, ordering him to vacate his office by June 21, 1982. She also advised him that if he did not remove his personal articles, they would be removed by the custodian and locked in a closet. (R. 9-26; PX 185) Harden did not remove his things and they were removed by the custodian and locked in a closet or or about June 21. (R. 9-27) Harden was required to remove his personal items while his hearing was in progress. He moved out of the Dothan/Ft. Rucker branch during breaks in his hearing, frequently traveling in the elevator transporting boxes of his belongings while members of his hearing committee rode down on the same elevator. (R. 9-28 through 29) Harden's office keys were also taken from him prior to June 30, 1982. (R. 9-28)

Respondent Grimmer wrote eight (8) students on the 23rd of June, 1982 and told them that Harden would not be employed after June 30. He advised them to contact Harden about incomplete grades and sent Harden a similarly worded notice, with a copy to the graduate registrar. (R. 13-165; R. 9-29 through 30; R. 9-33; PX 139)

Respondent Robert Paul testified at the trial that he did not consider that Harden was being given a hearing to prove anything specific. He stated that the only thing he was looking for

from the committee was agreement.[2] Paul further admitted that the hearing was only to give Harden due process. Paul said he had dismissed Harden and just wanted the faculty to take a look at it. (R. 14-199) Even through Harden was a tenured twelve month employee (R. 9-21) who had been set to teach the summer term of 1982. (R. 14-123); PX 368 B) He was not allowed to teach and received no salary after June 30. (R. 9-24)

When Harden's hearing began, objections were raised on his behalf that it clearly appeared that the hearing was a mere formality and that the steps taken by the administration showed Harden in fact already terminated. (PX 368 A)

The University attorney, Mr. Dow Huskey, informed the committee that Harden appeared before them as a fired employee and that Harden was not entitled to a pretermination or predetermination hearing. (PX 368 v. 1 pg. 1-24; v. 7 pg. 9 v. 7 pg. 11 all in Ex. 368) Huskey further advised the committee that he, as the administration's counsel, would take the committee's recommendation and weigh it before he made his own recommendation to the University on whether or not to give Harden his job back. (PX 368 v. 7 pg 9) Huskey stated to the committee: "So we look at this as a hearing in which he could get his job back." (ibid)

At the conclusion of hearing over fifty (50) hours of testimony, the committee deliberated its decision for about two (2) minutes and then voted that they concurred with the Termination of Harden. (R. 12-172 through 175) No findings of fact or discussion of charges or evidence were entered.

An extensive minority report was filed. However, respondent Paul did not even read the report. (R. 14-197) He did ask his attorney who had prosecuted the case if the charges had been sustained, and when told that they had, he asked the attorney to

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[2]It is undisputed by the defendants that the Harden Committee's decision was purely advisory and that defendant Paul had total and unbounded discretion to accept or ignore what ever recommendation they might make.

draft a letter for him to sign accepting the report. (R. 14-198) This was done, and a final letter from Paul was sent on August 30, 1982.

III. PROCEEDINGS BELOW

The instant case was remanded to the United States District Court for the Middle District of Alabama after the Eleventh Circuit reversed a series of orders granting summary judgment for defendants Paul, Grimmer, Kirkland and Thornton. See, *Harden v. Adams*, 760 F. 2d 1158 (11th Cir.) cert denied ....U.S...., 1-7 S.Ct. 530, 88 L.Ed.2d 462 (1985). The primary thrust of the decision was that the case involved complicated First Amendment questions and was therefore inappropriate to decide on motions for summary judgment.

The trail commenced on January 5, 1987 and on January 14, 1987 the trial concluded. On March 18, 1987 the District Court entered an opinion and order ruling against Harden on all counts. (R. 7-139 and 140)

Notice of appeal was filed by Harden on April 16, 1987 from both an order of June 20, 1986 (Harrison's summary judgment) and the order of March 18, 1987. (R. 7-141) On April 6, 1988 a *per curiam* decision was entered by the Eleventh Circuit affirming the District Court. Application for in banc consideration was made and denied on May 24, 1988.

REASONS FOR GRANTING THE WRIT

I. WERE HARDEN'S DUE PROCESS RIGHTS DENIED WHEN HE WAS TERMINATED AS A TENURED PROFESSOR AND THEREAFTER GRANTED A HEARING BEFORE A PURELY ADVISORY COMMITTEE?

As the facts show the petitioner was clearly denied a pretermination hearing. There can be no doubt that his

termination was final and the decision was irrevocable on the day respondent Paul gave Harden his termination letter.

The respondents immediately began steps to have him evicted from the college even before his "name clearing" hearing was scheduled. They did not pay him for salary he was due during the local hearing, they took his office keys, they locked his personal items in a closet, they informed students and other college officials that he would not be employed after June 30, and he was required *during his alleged due process hearing* to move out of the college building in plain sight of the members of the very committee conducting what the appellees now say was his pre-determination hearing!

The attorney prosecuting the case for the college told the committee that Harden appeared before them as a terminated employee but that *he* would place great weight on their recommendation in deciding if *he* would advise respondent Paul to give Harden his job back. The attorney even stated to the committee that Harden was not entitled to a pretermination hearing and that . . "we look at this as a hearing in which he could get his job back." (PX 368 v. 7 p. 9)

Respondent Paul, the ultimate decision maker, testified that he did not even read the minority report favoring Harden and that he merely asked the prosecuting attorney if the charges had been sustained. Paul also admitted that he did not see that the hearing has as its purpose to prove anything, that it was just so Harden would have due process. (R. 14-199)

Respondent Kirkland even admitted in her testimony that in May of 1982 that she had a meeting with defendants Grimmer, Thornton, Paul, and the university attorney wherein it was her understanding that Harden was to be terminated irrespective of any hearing. (R. 14-117)

The evidence shows clearly that on this point alone, if there were no other factors in Harden's favor in the case, that the appellant is due reinstatement and back pay. See, *Cleveland*

Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985); *Mulland v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950); *Bodine v. Connecticut*, 401 U.S. 371, 915 S. Ct. 780, 28 L.Ed.2d 113 (1971).

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) the Supreme court clearly pointed out that some kind of hearing prior to discharge of an employee with a constitutionally protected property interest is required. Harden got no hearing at all prior to the time the *actual* decision was made on May 6, 1982.

The respondents seemed to recognize their precarious position raised by the due process failures by arguing before the Eleventh Circuit that *Cleveland Board of Education v. Loudermill, supra* should not be followed because it was decided after Harden's termination. Their apparent claim that such a decision should not be given retroactive application fails in view of the many supreme Court decisions cited in *Loudermill* where this Honorable Court pointed out that its decision was consistent with a long line of prior cases.

II. WERE HARDEN'S FIRST AMENDMENT RIGHTS VIOLATED WHEN HE WAS TERMINATED AS A TENURED PROFESSOR FOR, AS PRESIDENT OF A FACULTY UNION, WRITING A LETTER TO HIS UNION MEMBERS URGING COLLECTIVE EFFORTS TO ADDRESS FACULTY CONCERNS?

In this case, it is clear that Harden' exercise of First Amendment rights were a substantial or motivating factor in the decision to terminate him. This is clear because First amendment activities were made a part of the written charges against Harden; and, Thornton and Kirkland admitted other first Amendment activities led to their decision to recommend termination. (See, PX 368 v. 3p 72, 75 and 77; PX 368 v. 10 p. 24, 26-27; PX 368 v. 9 p. 148 & 149; and R 14-98).

Harden contends that the record establishes quite clearly that he had exercised First Amendment rights on matters of public

concern and that such activities were a substantial or motivating factor in his dismissal. Thus, the matter becomes one of applying the tests in *Mt Healthy v. Doyle*, 429 U.S. 274, 975 S.Ct. 568, 50 L.Ed.2d 471 (1977) and the separate test in *Pickering v. Board of Education*, 391, U.S. 563, 20 L.Ed. 2d 811, 88 S.Ct. 1731 (1968). The record shows that the respondents entirely failed to meet the burden established by these cases.

Under *Mt.Healthy, supra*, the respondents could possibly prevail by establishing that the decision to terminate would have been made on the basis of other misconduct. However, the respondents could not and did not establish that Harden would have been terminated for the non-protected charges made against him. Such "other reasons" are clearly frivolous and inconsequential and were actions other faculty members had been engaged in without action being taken against them. (See R. 14-61 through 74)

The factual failings noted above also pose a serious problem for the respondents one the *Pickering, supra*, balancing test comes into play. In *Pickering* the Supreme court enumerated several factors to be considered in deciding whether or not the state may limit First Amendment rights through the means of termination of employees who have exercised those rights. Those factors are: 1.) Whether the statements were directed to person with whom the speaker would normally be in contact in the course of his *daily* work. 2.) What adverse effects were had on discipline by intermediate supervisors or harmony among co-workers. 3.) Whether there existed a personality, loyalty, or confidence factor between the employee and others affected by the expression. 4.) Whether the statements have impeded the employees' proper performance of his daily duties or interfered with the daily operation of the office. (See *Pickering, supra*, at 391 U.S. 570-573).

The *only* facts offered by the respondents tending to fall within any of the above factors was evidence that the administrators who were sued by Harden were angry about what he said and how he said it. The only non-defendant to testify on these points was Dr. Swords who only stated that he and Harden ceased to

exhange social greetings when they would have chance encounters.

The fact that Harden was critical of Swords, Paul, Kirkland or Troy state University in and of itself does not even begin to approach the proof necessary for the appellees to swing the *Pickering* balance in their favor. The Supreme Court in *Ranking v. McPherson*, ...U.S..., 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) stated:

> The inappropriate or controversial character of a statement is irrelevant to the question (of) whether it deals with a matter of public concern. 'Debate on public issues should be uninhibited, robust, and wide open, and...may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials' *New York Times Co. v. Sullivan*, 3760.5.254, 270 (1964); see also, *Bond v. Floyd*, 385 U.S. 116, 136 (1966); 'Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.'

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

BY J. Victor Price, Jr.

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Counsel for Petitioner

August 22, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing petition for Writ of Certiorari on the following counsel of record for the respondents:

Dow T. Huskey, Esq.
P. O. Box 1501
Dothan, Alabama 36302

Richard F. Calhoun, Esq.
P. O. Box 489
Troy, Alabama 36081

Done this——26———day of September, 1988.

BY J. Victor Price, Jr.
J. Victor Price, Jr.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DISTRICT

T. DEWEY HARDEN, JR., Plaintiff VS. ROBERT M. PAUL, Etc.; ET AL, Defendants.	CIVIL ACTION NO. 82-453-N

JUDGEMENT

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED, ADJUDGED and DECREED by this Court that Plaintiff take nothing by his complaint herein; that judgment be, and the same is hereby, entered in favor of Defendants against the Plaintiff; and that costs of the action be, and the same are hereby, taxed against the Plaintiff, for which execution may issue.

Done this 18th day of March, 1987.

Signed
UNITED STATES DISTRICT JUDGE

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DISTRICT

T. DEWEY HARDEN, JR., Plaintiff, VS. ROBERT M. PAUL, Etc.; ET AL, Defendants.	CIVIL ACTION NO. 82-453-N

OPINION

Plaintiff claims that his tenure as an instructor was terminated because of his exercise of rights protected by the First Amendment and without due process of law. The Court of Appeals reversed this Court's Summary Judgment for the current Defendants and a two-week trial results in the following findings of fact and conclusions of law.

FACTS

I. BACKGROUND. This cause is now before the Court for a final decision based on the evidence presented at trial on the Plaintiff's claim under 42 U.S.C. § *1983.*

Plaintiff in this cause, Dr. T. Dewey Harden, Jr., is a former Assistant Professor at the Troy State University Dothan/Ft. rucker campus (TSUD-F) in the areas of counseling and psychology. Plaintiff began teaching at Ft. Rucker in approximately 1971 and continued in a position as an assistant professor there until his dismissal in the summer of 1982. Shortly after coming to Troy state University. Plaintiff was approached by officials from the Alabama Education Association (AEA), an organization dedicated to representing the interest of teachers from the grammer school level to the college level. The AEA officials asked if Plaintiff would be interested in attempting to organize a local chapter of the AEA at the main Troy State University campus in Troy, Alabama. Plaintiff attempted to do so but was unsuccessful in his efforts. Later, however, in 1977 or 1978, the Plaintiff was successful in his efforts to organize an

AEA chapter at the TSUD/F campus in Dothan, Alabama. Plaintiff also claims to have been an informant to the Equal Employment Opportunity Commission (EEOC) regarding equal pay claims against TSUD/F. It is this affiliation with the AEA and the EEOC that Plaintiff claims led to his dismissal from the TSUD/F faculty. He further contends that charges against him in his termination hearing were violations of his First Amendment right of free speech. The expiration of years and more serious transqressions, including several days A.W.O.L. while in jail, convince this Court that these matters played no substantial part in the dismissal.

The Plaintiff was very active in his involvement with the AEA and, to a lesser extent, with the EEOC and was instrumental in gaining the faculty a greater voice in the drafting of the faculty handbook and in achieving a cost-of-living raise for the faculty on at least one occasion. However, such affiliation was not the reason explicitly given for his termination. Plaintiff's termination was immediately precipitated by an event that was unconnected to the AEA. That event concerned Plaintiff's criticism of another instructor's techniques in the course know as Group Dynamics.

REMARKS ABOUT DR. SWORDS. In March, 1982, two students, Mr. Jeffers and another student, approached Plaintiff concerning their grades in Group Dynamics, which was taught buy Dr. I. R. Swords, because they had received "C" in that course, they were to be dropped from the graduate school program in the School of Education. This was so because the "C" caused their grade point averages to fall below the minimum required under TSUD/F regulations. Upon being told by Jeffers and the other student they has received "Cs" and were to be dropped from the graduate school program, Plaintiff made some very derogratory statements about Professor Swords to these two students in a loud voice heard by at least two other witnesses in adjoining offices. Although Plaintiff claims that he merely pointed out to the students that Dr. Swords was not officially "certified" to teach Group Dynamics, the preponderance of the evidence is to the contrary.

A Ms. Anderson, also an instructor at TSUD/F, overheard the Plaintiff state that Professor Swords was not "qualified" to teach Group Dynamics. Ms. Chryzanowski, a part-time typist at TSUD/F, who was also present when the Plaintiff made the remarks, testified that Plaintiff stated that Professor Swords was

not "qualified" to teach Group Dynamics and that Swords should have never been allowed to teach the course. Officials testified that there was no certification process in existence for teaching Group Dynamics. Therefore, it would have been rather meaningless for Plaintiff to point out to the two students that Dr. Swords was not certified in an area for which there was no certification process.

The testimony indicates that Plaintiff appreared very angry when he made these remarks and that this was possibly due to the fact that Professor Swords has been promoted to the position of department Chairman over the Plaintiff. Another student, a Mr. Kimbrough, also heard Plaintiff make such statements and became interested in attempting to raise his "C" grade in the course.

After speaking to the Plaintiff, Jeffers and or Kimbrough drafted a petition that was very derogatory of Professor Swords.[1] Plaintiff claims that he did not advise the students to draft this petition and that he did not advise the students to whom they should present it. However, he admitted talking to them of a strongly worded petition and other circumstantial evidence tends to indicate his participation therein.

Ms. Chryzanowski testified that the plaintiff had more than one appointment with Jeffers and Kimbrough concerning this matter. Her testimony indicates that Plaintiff read the petition,

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[1] Among other things, the petition accused Dr. swords of being unfamiliar with the material in the course textbook; with improper grading; with pressuring students to drop the course; and with discriminating against certain students in the grading process solely due to personal considerations. The petition then stated that each student in the course should have his or her grade changed to an "A" due to Dr. Swords' "sketchy and undefined" description of course requirements. Shortly after Jeffers and Kimbrough began circulating this petition, Dr. Swords responded to the charges therein in a letter to Dr. J. Wyatt Grimmer Dean Vice President of Academic Affairs at TSUD/F. In this letter, Dr. Swords denied the charges in the petition and explained the basis for his denial. He attached the two students' final exam papers which appear to be deficient in many respects. Mr. Kimbrough failed to answer a large part of the test and Mr. Jeffers' answers are obviously poor, even to a person not versed in Group Dynamics. In answer to a question asking him to describe "Synetics", Jeffers responded: "A new process developed by one man and then further embellished later by another. I can't recall exactly what was so different, but I think it dealt with synthesizing feelings or perhaps role-playing through to an acceptable solution. I know exactly what it is in the book, but the rest escapes me." The other responses on Mr. Jeffers' final exam were only slightly better.

approved it and urged the students to present it to Swords' superiors. Other testimony tends to indicate that Plaintiff told the students to present the petition to the local newspaper as well; however, the evidence on this point is inconclusive.

After the students spoke to Plaintiff and showed him the petition, Plaintiff apparently implicitly approved of its contents. According to Plaintiff's own testimony, he read the petition and then said nothing to the students concerning it. Plaintiff claims he neither approved or disapproved. However, as counselor to one of the students, Plaintiff's silence could have been viewed by them as an implicit approval. Plaintiff knew there was only one way to change grades and had the duty, as counselor, to inform his counselee that it might be best to follow regular channels for changing grades. Plaintiff failed to do this and, instead, did not discourage the students from circulating the petition and presenting it to Sword's superiors. Ms. Chryzanowski eventually told Kimbrough that he should go through regular channels to have his grade changed rather than circulating the petition. Ms. Chryzanowski told Kimbrough that she felt it would be more effective for the students to present their case to the administration of TSUD/F or to appeal to the graduate council. In the end, the students were advised by Dr. William T. Thornton, Dean of Student Affairs at TSUD/F and a Defendant in this cause, that they would be better off abandoning the petition and drafting personal, nonderogratory letters to the Graduate Council. This is the approach the students eventually followed, and it resulted in one of them being readmitted to the graduate school program.

Eventually, Dr. Swords heard of the petition, Plaintiff's alleged involvement in urging the circulation and Plaintiff's statements concerning Sword's qualifications. Dr. Swords was Chairman of the Department of Paychology and Counseling (Plaintiff's Department) and became very angry about what the Plaintiff had said about him. Swords initially spoke to his attorney about the possibility of a lawsuit against Plaintiff and/or TSUD/F. Instead of filing suit, Swords eventually demanded that Dr. grimmer, Vice President of Academic Affairs at TSUD/F, do something about Plaintiff's involvement in the incident. Swords made it abundantly clear that he could no longer work with the Plaintiff. Indeed, Plaintiff and Professor Swords discontinued speaking to each other, even when they passed in the hallway.

As a results of Professor Sword's demands, a meeting was held among the top TSUD/F administrators. Present at the were Vice President of Academic Affairs Grimmer, Dean of Student Affairs Thornton, Dean of the School of Education, Psychology and Counseling Kirkland, Dr. Swords, Department Head in Plantiff's department and Dr. Oberst. After discussing what possible action could be taken, the group decided to recommend the Plaintiff's termination to Defendant, the President of TSUD/F, Robert M. Paul.[2] A meeting between Defendant Paul and the aforementioned administrators was held, and Defendant Paul concurred in the recommendations. Shortly thereafter, on May 6, 1982, Plaintiff was personally delivered a notice of dismissal, effctive June 30, 1982, by defendant Paul. This notice advised the Plaintiff that he had a right to appeal his dismissal and referred him to the page of the faculty handbook on which he could find information concerning the hearing. The portion of the faculty handbook referred to made it clear that Plaintiff's dismissal was subject to the results of any such hearing. He was given a list of the Committee members on June 21, 1982, with notice that his challenges should be filed within five days or would be waived. Plaintiff was also notified by the May 6 letter from President Paul that he was being terminated "on the grounds of professional incompetence, neglect of *** professional duties, and failure to observe and practice the established policies and procedures or the violation of established policies and procedures of the University as follows ***," The notice went on to list 20 specific reasons for the Plantiff's termination, all of which will be discussed at length infra.

Shortly after he received the May 6 notice of dismissal, Plaintiff duly requested a hearing, but instead of responding to President Paul's notice of dismissal, Plaintiff, by and through his attorney, wrote Ralph W. Adams, President of the entire Troy State University system, to request a hearing before the Faculty Advisory Committee of the entire system. President Adams responded on June 8, 1982, and informed Plaintiff that Mr. Paul, as chief executive Officer at TSUD/F, had been delegated the

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[2] At various times, Mr. Paul was acclaimed to be President, Chief executive Officer and Vice President for TSUD/F during his years as the Chief Officer at TSUD/F.

authority to terminate faculty personnel and that all appropriate administrative remedies would be handled through Mr. Paul's office. In the Opinion reversing the grant of summary judgment in this case, the Eleventh Circuit Court of Appeals ruled that Dr.Adams had the authority to delegate his power of termination of faculty to Mr. Paul. See *Harden v. adams*, 760 F.2d 1158, 1165, n. 1 (11th Cir. 1985). This Court is of the opinion that Dr. Adams also had the authority to delegate to Mr. Paul the power to provide rules as to the time and place of meetings as well as the personnel of the Committee as long as such complied with due process of law.

Although Plaintiff was informed on or before June 21 in writing of the time of the proposed hearing, the plan for a private hearing and the composition of the hearing committee, Plaintiff waited until the Faculty Personnel Advisory Committee at TSUD/F had convened July 7 to hold Plaintiff's hearing before he raised any question about the time of the hearing, the composition of the Committee or the fact that the public was barred from the meeting. One would expect Plaintiff, facing charges including sexual improprities, would have welcomed a private hearing However, having received the early notice of the private hearing and of the composition of the Committee, his first complaint was made to the Committee in open session. Instead of complaining to Dr. adams or Mr. Paul, who had the power to change the order of things already mandated by Mr. Paul, he objected to the committee who was convened and commissioned to determine the propriety of his discharge. This untimely and misplaced objection was due either to Plaintiff's neglect or was for the purpose of placing the Faculty Personnel Advisory committee and its chairman in a position where they would feel compelled to deny Plaintiff's contentions due to time constraints on busy faculty members scheduled for immediate beginning of what turned out to be a lengthly hearing, thereby hopefully creating reversible error in Plaintiff's favor. This Court is of the opinion that the Plaintiff waived this argument, or, if Plaintiff has not waived it, that the contention is devoid of merit. President Adams clearly delegated to Paul the power to handle any administrative remedies concerning Plaintiff. Indeed, the very nature of the faculty Personnel Advisory Committee's duties indicates that its purposes would be best served by having a local

committee for consideration of local Troy State University problems pursuant to rules and schedules to accommodate local conditions. Troy State University has campuses on several continents established primarily to offer advanced education to American military personnel stationed there. The purpose of the Faculty Personnel Advisory committee is to be a sounding board for problems arising on particular campuses. It would seem, therefore, that individuals who are familiar with the problems of the particular campus involved would be the type who would be prime targets for committee membership. The Faculty Personnel Advisory Committee at the main Troy State campus in Troy, Alabama, would be poorly prepared to hear faculty complaints from foreign campuses although, on timely request, they may well have been prepared to consider Plaintiff's contentions, especially his technical complaints. Moreover, it is unreasonable to require faculty members of every other Troy State University campus to travel to Troy, Alabama, to have their grievances heard. This is essentially what Plaintiff claims is required. Although the faculty handbook does not specifically give the Presidents of the separate Troy State University campuses the right to appoint a Faculty Personnel advisory committee for their particular campus, it does not deny this right either. Therefore, this Court finds that President Paul has the power and authority to appoint a Faculty Personnel Advisory Committee composed of members of the TSUD/F faculty and administration to hear employee grievances and to hold hearings on faculty terminiations according to rules molded to fit local conditions.

At Plaintiff's request, the time for the hearing was continued until July 7, 1982. The Plaintiff was represented at and before the hearing by able counsel and was accompanied at the hearing by counsel and an official from the AEA, but the Committee met on July 7 to consider the propriety of Plaintiff's discharge with no prior knowledge that the Committee and the rules for its operation would be challenged.

Other complaints the Plaintiff made on July 7 concerning the Committee are that the Committee members were predisposed to vote aginst him and that Buchanan, the committee chairman was unfair in his conduct of the Committee hearing. These allegations are without merit. A review of the hearing transcript reveals that Mr. Buchanan was quite fair in his

conduct of the hearing. It is evident that Mr. Buchanan tried to be fair in his rulings. He often excluded, as irrelevant, evidence which was unfavorable to the Plaintiff. As far as the Plaintiff's contention that the Committee members were predisposed to vote against him is concerned, the Committee members deny this, and the Plaintiff presented no evidence at trial, only his conclusory allegation, to support this contention. Plaintiff's friend and AEA comrade, Mr. Stark, was a member of the committee and wrote the opinion dissenting on the general ground that the facts shown were infufficient in his opinion to justify discharge. The evidence admitted at trial shows that Plaintiff received much more than a "name clearing" hearing. The hearing lasted over 50 hours and began on July 7 and ended July 29, 1982. TSUD/F chose to accept the burden of proof, which it was not required to do, and had a transcript made of the hearing testimony at its own expense. This transcript was over 1500 pages long and a review of it show that Mr. Buchanan attempted to assure Plaintiff a fair hearing.

President Paul also purposefully insulated himself from the hearing in order to assure its fairness. In addition, he directed the administrators involved and the Faculty Personnel Advisory committee members not to discuss the charges against Plaintiff with anyone. This was done in order to further insure Plaintiff a fair hearing.

Plaintiff also alleged that the Committee members and the administration were out to get him. Plaintiff pointed to no evidence at trial that would support his claim that the committee members were predisposed to rule against him. In addition, as noted supra, Mr. Stark, one of the Committee members, was a member of the AEA and a friend of Plaintiff. Stark has served as AEA President in the past and assisted Plaintiff when Plaintiff was AEA President. It is important to note that Mr. Stark was the only Committee member to vote in Plaintiff's favor. Mr. Stark claimed that he did this because he felt there was insufficient evidence to support the discharge of a tenured faculty member. This Court would be interested to learn what would be good cause in Mr. stark's opinion. In light of the lengthy hearing transcript and the evidence presented at trial, this court is compelled to conclude that, if anyone on the Committee was biased, it was Mr. Stark.

Plaintiff also submitted no evidence to support his claim that

the administration was out to get him. At least one of the defendants, Dean Marjorie Kirkland, was an AEA member and a member of the administration. She was also Plaintiff's immediate superior as Dean of the School of Education and Psychology. As noted infra, Plaintiff often failed or refused to comply with Dean Kirkland's directives. He also attempted to ridicule her in the presence of students on at least one occasion. Well after accepting his ridicule and insubordination and after hearing others make charges against him, she condluded that he was a detriment to TSUD/F and should be terminated. The evidence relating to these matters will be discussed in more detail infra.

Evan though Plaintiff had gratuitously insulted most of his superiors at TSUD/F, this court finds that the atmosphere in which the hearing was held was conducive to a fair and impartial hearing, such as the faculty handbook requires.

Another Defendant/Administrator, Dr. William T. Thornton, dean of Student affairs, has been a friend of Plaintiff's when both of them were working on their doctorate at the University of Mississippi. Dr. Thornton was responsible for having Plaintiff appointed advisor to Gamma Beta Phi, the only national honorary society of the TSUD/F campus. In addition, Dr. Thornton interceded on Plaintiff's behalf on one occasion to prevent Plaintiff's termination. this occured when Plaintiff was arrested for contempt of court due to his failure to abide by a divorce decree. Plaintiff spent several days in jail due to his arrest and was unable to teach his classes. In Alabama, one refusing to comply with a court order is subject to civil contempt proceedings whereby he may be jailed pending compliance. Dean Thornton and others substituted for Plaintiff and taught his courses. Dean thornton also interceded for Plaintiff by pointing out to the TSUD/F administration the Plaintiff's arrest was unrelated to his employment at TSUD/F and urged that Plaintiff not be discharged for absence from his classes. The administration accepted this recommmendation.

As faculty advisor to Gamma Beta Phi, Plaintiff was Dean Thornton's subordinate due to Dean Thornton's being the Dean of Student Affairs. Plaintiff's insubordinate attitude towards Dean Thornton, to be discussed infra, was apparently the primary reason for the breakdown in their friendship.

President Paul, the Chief Administrator of TSUD/F, also felt the sting of Plaintiff's insubordination. President Paul was

referred to in a derogatory manner in a letter Plaintiff circulated among all AEA members. Plaintiff also told Dean Thornton in 1980 that Plaintiff was "going to get that little bastard", referring to Mr. Paul. This is further evidence of Plaintiff's insubordinate attitude, and it is also evident that Plaintiff filed this suit to cause problems at TSUD/F more than to seek relief for violation of his rights. The fact is that Dean J. Wyatt Grimmer, Vice President of Academic Affairs, is the only Defendant/Administrator who was not directly insulted or treated in an insubordinate fashion by Plaintiff. At some point, any reasonable school administrator would find such insubordainate conduct inconsistent with the educational purposes, if not intolerable, and seek to impose some type of disciplinary action. The surprising thing is that the administration did not take disciplinary action sooner.

As noted earlier, Plaintiff was given 20 reasons for his termination. A summary of the evidence in support of and in opposition to each of these charges follows. For the purpose of convenience, the court will discuss the charges and the evidence relevant to them individually. Charges relating to similar incidents will be grouped and discussed together.

II. THE CHARGES AND THE EVIDENCE.

1. Unacceptable Statements Concerning the Qualifications of the Chairman of the Department (Swords). The evidence on this charge has been previously discussed. However, this Court will note that it finds the preponderance of the evidence indicates that the Plaintiff's statements about Professor Swords were to the effect that Professor Swords was not qualified to, and should never have been allowed to, teach Group Dynamics. This court finds these statements to be false, highly insubordinate, unprofessional and inconsiderate of the feelings of a colleague and superior. Such statements foment disharmony among students, the faculty and the Administration and interfere with the public function of the state's advanced educational system.

Plaintiff attempts to evade this charge by claiming that Professor Swords was a mere figurehead as chairman of his department. Indeed, in Court, Plaintiff denied that Dr. Swords had been head of the department but later admitted that Swords has been so designated while denying that he so acted. Contrary to Plaintiff's bald original assertions, it is clear from the testimony of the other witnesses that Dr. Swords was the

Chairman of Plaintiff's Department and Plaintiff's immediate superior. Plaintiff's insistence in Court that Professor Swords was a figurehead and has no real control over the Plaintiff is further evidence of Plaintiff's rank insubordination. This Court finds that Plaintiff's statements about Professor Swords and his actions in regard to the Jeffers/Kimbrough petition were alone a sufficient basis for Plaintiff's termination.

2. Making or Attempting to Make Extra Charges or Expenses to Students Other Than Those Fees Listed in the Quarterly Schedule. This charge basically relates to the Plaintiff's violation of an administrative regulation proscribing the holding of activities outside of class that require the students to spend extra time and money other than what they were scheduled to spend on the class. The rule arose from the fact that most of the students at TSUD/F were adults working full time elsewhere whose time and money were extremely limited. Plaintiff often held field trips to places outside the Dothan/Ft. Rucker area and sometimes engaged his students in what Plaintiff referred to as "marathon counseling sessions". In order to conduct these sessions, Plaintiff would begin by having a group discussion session that lasted three to four hours. He would then gradually extend the length of these sessions to 12 hours and, finally would extend the length of the sessions to a 24-hour marathon counseling session.

The Plaintiff admits that the field trips and sessions entailed extra time and the expenditure of money by the students. However, he claims that the trips were not a course requirement, were merely voluntary and that, therefore, were not in contravention of TSUD/F rules, regulations and policies. TSUD/F, on the other hand, contended and students testified that the trips were required or, if they were not specifically required, that the students felt that they were a requirement and would feel pressured to attend by the possibility of a poor grade in the course. The Court finds that the preponderance of the evidence shows the students were not told the trips were voluntary and that their grades would not suffer if they missed a trip.

There was undenied evidence that the general rule was that no field trips could be required in a course unless the trip or session was mentioned in the course description in the student handbook or unless approved by the Administration. With the

exception of one trip approved verbally by Dean Kirkland, the preponderance of the evidence shows the Plaintiff never bothered to seek permission or change his course discription so that they would be a part of the course. Plaintiff claims that such descriptions were included in earlier course descriptions and that he was unaware that this notice has been removed from some coure descriptions. Defendants claim and the court finds that it was Plaintiff's duty to make sure his course descriptions in the student handbook were accurate. The preponderance of the evidence shows that the Plaintiff tended to disregard the requirements that he notify his superiors of the field trips and receive permission before suggesting these trips and marathon counseling sessions. There is also evidence that some students resented the Plaintiff's *requiring* these field trips and sessions. Of course, there is evidence that other students enjoyed the field trips and sessions and felt they derived a benefit therefrom. However, the administration had a duy to fashion its curriculum to benefit and potect its average student - the working, part-time student. The testimony on this issue presents further circumstantial evidence of the Plaintiff's disregard for rules, regulations and policies and of the Plaintiff's insubordinate attitude.

3. Failure to Keep Adequate or Required Office Hours; 4. Failure to Keep Appointments with Students; 10. Grievances From Students regarding Professional Duties. Since these charges are so closely related, the Court will discuss them jointly. Professor Kirkland first complained in Plaintiff about his failure to keep office hours in 1972. These complaints continued over the next 10 years until Plaintiff's termination in 1982.

All faculty at TSUD/F are required to keep regular office hours so that students will have no problem locating the professor in the need arises. According to the evidence, the importance of office hours and the fact that TSUD/F faculty were required to keep them except when excused was discussed at nearly every faculty meeting. Plaintiff claims that he regularly kept office hours and that his failure to do so resulted in his missing a total of only three student appointments at the most in 10 years at TSUD/F. Plaintiff claims he missed these appointments due to medical emergencies or other emergencies. However, he did not call in to explain his absence and other testimony reveals that the Plaintiff missed three

appointments with one Ruth Oliver alone. In addition, several other memos that were introduced in evidence at the administrative hearing reveal that Plaintiff missed office hours for almost a full two weeks in 1981 while soliciting applications for Gamma Beta Phi, an honorary to which Plaintiff was faculty advisor. This prompted Dr. Kirkland to send the Plaintiff a memo regarding his failure to keep office hours. Kirkland's memo commended Plaintiff on his efforts to recruit Gamma Beta Phi members, but it pointed out to Plaintiff that his efforts to solicit Gamma Beta Phi members did not excuse him from keeping regular office hours as required by his contract. The memo urged Plaintiff to seek help in the future from the student members of Gamma Beta Phi in soliciting applicants. This memo was dated May 4, 1981.

Some five months later on October l, 1981, when he was under fire from Dr. Grimmer for not attending to his duties as faculty advisor for Gamma Beta Phi, Plaintiff attached this memo to a notice which he sent to all Gamma Beta Phi members. In this notice, Plaintiff referred to the May 4 memo as harassment and stated that TSUD/F provided no assistance to Gamma Beta Phi. He urged the Gamma Beta Phi members to contact Kirkland's superiors asking for encouragement not harassment. "However", he said, "feed-back to Administrators at TSUD/F tends to never reach the faculty or public so letters to the editor, The Dothan Eagle, will be published." A few students responded to Plaintif's request and wrote members of the administration complaining about Kirkland's actions. However, other students complained that Plaintiff's sending this notice to Gamma Beta Phi members was improper. One responsive letter chastised both Plaintiff and the Administration for involving students in petty matters. Plaintiff also encouraged officers of Gamma Phi to resign from their offices in order not to be involved. In any event, Plaintiff's actions caused a great amount of disharmony among the Gamma Bata Phi students and, as might reasonably have been expected, caused disharmony in Plaintiff's relationship with Dr. Thornton, Dean of Student Affairs, and with Dean Kirkland, the Dean of the School in which Plaintiff was employed to teach. Dean Kirkland was upset that the Plaintiff would attempt to make her look bad in front of students. This is further evidence of Plaintiff's insubordinate attitude, as well as of his creation of disharmony in the educational process.

Dean Kirkland's request was not unreasonable. She was Plaintiff's superior and had a duty to see to it that Plaintiff followed school policy and his contract concerning office hours. Contrary to Plaintiff's testimony, this Court finds the tone of Dean Kirkland's May 4 memo to Plaintiff to be very tactful and somewhat pleasant, although necessarily directive. If Plaintiff had differences with Dean Kirkland's request, the professional and mature thing to do would have been to go to Dean Kirkland or some other administrator and discuss the problem with her or him. This the Plaintiff did not do. Instead, he sent a memo to all Gamma Beta Phi members portraying Dean Kirkland as an ogre who was harassing Plaintiff for his efforts in promoting Gamma Beta Phi.

This was a false implication about Plaintiff's superior and was disruptive of the educational process.

5. Failure to Submit Course Outlines As Required; 6. Failure to Teach the Course Material as Set Out in the Course Outlines; 7. Failure to Teach the Course Material Adequately. Numbers 5, 6, and 7, being related, will be discussed together.

These charges basically relate to Plaintiff's teaching habits exercised in violation of administrative rules. All instructors, including Plaintiff, were required to prepare an outline for each course taught and submit it to Dean Kirkland at the beginning of each quarter. Plaintiff contends that he was required only to keep an outline on file and update it if any changes were made. He contends that he was not required to prepare a new outline every quarter. The evidence on this issue was inconclusive. There was no evidence that Plaintiff was counseled about this failure by Dean Kirkland with whom the outline was to have been filed. However, it is clear that Plantiff failed to turn in a newly prepared outline for the course on Information Services until the last two or three class meetings during his last quarter at TSUD/F.

Plaintiff admits that he did not always strictly follow the course outline while teaching; however, testimony of Dr. Swords and Mr. Stark tends to indicate that they also strayed somewhat from the strict letter of their outlines on occasion. Regarding the last charge in this group -- Failure to teach Course Material Adeqqately -- the evidence shows that complaints were made to Plaintiff's superiors concerning Plaintiff's teaching technique and his failure to teach on the schedule shown in some class outlines.

At least one student testified that Plaintiff's teaching techniques in a statistics course left her woefully unprepared for her plans to attend graduate nursing school. This hearsay evidence was admissable in the Faculty Advisory Committee hearing.

This Court finds it difficult to draw any clear conclusions based on the preponderance of the evidence that these three charges were a cause of Plaintiff's discharge. However, the preponderance of evidence does indicate that Plaintiff was sometimes late in turning in course outlines and that sometimes he did not turn in an outline at all in violation of University policy. The evidence also indicates that some students were dissatisfied with the Plaintiff's teaching techniques. Dean Kirkland's reluctance to counsel Plaintiff is understandable in view of the likelihood of resulting recrimmination of anyone opposing Plaintiff. These matters, however, could have only a slight effect on the accumulation of problems of Plaintiff, but they are somewhat magnified by his disdain for administrative rules.

8. Continually Bringing or Requesting that Food be Brought into the Classroom with the Students After Being Requested not to do so. The Army supplied the building in which classes were held at the Fort Rucker branch of TSUD/F. The Army had a contract with a janitorial service to clean this building. This contract provided that the janitorial service would not clean up food and drink refuse. Therefore, the Army adopted a rule prohibiting the bringing of food and drink in the classrooms at Ft. Rucker. Signs were posted in strategic locations to inform people that no food or drink was allowed in the Ft. Rucker TSUD/F buillding. The evidence indicates that violations of this policy by the TSUD/F faculty, staff or student body could result in adverse consequences to Troy State University. There was some testimony that violations of the the food and drink policy might even result in Troy State University's losing the contract to teach classes at Ft. Rucker. A loss of this contract would result in substantial monetary loss to Troy State University. The preponderance of evidence shows that Plaintiff enforced the "no food and drink" policy at Ft. Rucker half-heartedly, if at all. On one occasion, Plaintiff and his students set up a table of food in one of the classrooms at the Ft. Rucker branch. However, the evidence tends to support Plaintiff's contention that he received permission from Major Hubert Blank, the officer in charge of the building in which the table of food was placed, to violate the food-

in-the-classroom rule. There was no evidence that Major Blanks had authority to waive the rule. Other evidence tends to indicate that some other faculty members also enforced the "no food or drink" policy half-heartedly and that Plaintiff was not counseled thereon except by abundant signs. However, the evidence on this issue further indicates the Plaintiff's disrespect for rules and regulations.

9.Requiring Personal Information and Pictures from Students After Being requested Not To Do So. At the beginning of each quarter, the Plaintiff requested or required students to fill out a 5x7 card with certain personal information with an attached passport-size phot of themselves. This information included the student's name, address, employer, home phone number, goals in life and, as noted, the photograph. The Plaintiff requested this information so that he could remember his students in class and in case he was asked to write a letter of reference for them. The administration depolored and prohibited the practice because female students complained that their names, addresses and phone numbers were no concern of their bachelor instructor and were sometimes left in a classroom on public display. Plaintiff claims that students were not required to give him the information he requested. He claims that providing the information was completely voluntary and up to the students. However, former students uniformly testified that filling out the 5x7 card and providing the Plaintiff with a photograph was required nd was an assignment for the course. There was evidence at the administration hearing that students complained about providing Plaintiff with this information, and on at least one occasion, a student complained that her personal information card with photo attached was left on a desk in a classroom used by military personnel at Ft. rucker for over two day available for anyone to see. Other testimony tends to indicate that some other professors also requested certain personal information from their students. While this charge is not a very strong basis for the Plaintiff's termination, it adds to the charge that Plaintiff has little, in any, regard for regulations and fostered disharmony with the students.

11. Failure to Follow Established Procedure for Changing of Grades; 12. Advising Students Improper Procedures for changing A Grade; 13. Advising Students to Draft a Petition and Get the Signatures of Other Students in Contravention of

University Policy; 14. Advising Students to Draft a Petition Which was Degratory to the Chairman of the Department; 15. Advising or Agreeing that the Petition Be Take to a Local Newspaper. The evidence relevant to these charges relates to the statements Plaintiff made concerning Professor Swords' qualifications and the petition he allegedly directed the students to present to local newspaper and to Professor Swords' superiors. The procedure for changing a grade at TSUD/F required the professor who gave the student the grade to fill out a special form indicating that the grade would be changed. Plaintiff, however, at least did not discourge Jeffers and KImbrough from drafting a petition and submitting it to Professor Sword's superiors. Plaintiff also allegedly suggested that the students submit said petition to *The Dothan Eagle*, Dothan, Alabama's main newspaper. It is not clear whether Plantiff explicity approved of the language used by the students in the petition; however, it is clear that the Plaintiff reviewed the petition after the students had drafted it and did not disapprove it as counselor for one of the two students. The evidence relating to these charges re-emphasizes Plaintiff's insubordinate attitude and his lack of regard for rules, regulations and school policies.

16. Failure to Follow Establihed Procedures by Notifying Students of Grades Given by Another Professor. No evidence was presented on this charge at trial, and, apparently not at the committee hearing.

17. Formenting Disharmony and Dissension Among the Students and Staff of the University in the Handling and Sponsorship of Gamma Beta Phi. In 1977, Plaintiff was approached by Dean Thornton and asked to serve as faculty advisor to the Gamma Beta Phi scholastic honorary. This is the only national scholastic honorary on the TSUD/F campus. Plaintiff accepted and served in this position from 1977 until he was dismissed as faculty advisor in 1981. The preponderance of the evidence on this issue leads one to the the conclusion that Plaintiff quite often neglected his duties in relation to Gamma Beta Phi and Misappropriated some funds of Gamma Beta Phi.

Contrary to the rules established by the national headquarters of Gamma Beta Phi, the Plaintiff neglected the drafting of a constitution for the local chapter of Gamma Beta Phi. Plaintiff also neglected the holding of elections for Gamma Beta Phi

officers the last two years he served as advisor. The national Gamma Beta headquarters, however, required local chapters of the honorary to elect officers at least once a year. There were no officers. Prodded by Dean of Student Affairs Thornton, Plaintiff scheduled an election for officers in the fall of 1981 for the 1981-82 academic year. When the incoming officers for the 1981-82 academic year accepted their positions, there was no outgoing slate of officers to acclimate them to thier new positions. This caused some confusion in the Gamma Beta Phi honorary for a short period during 1981-82.

Plaintiff also failed to make sure that the TSUD/F Gamma Beta Phi Chapter held the minimum number of six meetings per year as required by the national honorary. Plaintiff testified that Gamma Beta Phi held from three to five meetings annually, below the minumum number. Dean William T. Thornton, Dean of Student Affairs and the Administrator in charge of student organizations at TSUD/F, testified that Plaintiff never held more than one meeting a year as Gamma Beta Phi advisor, and this was actually not a business meeting. Dean Thornton testified that this "meeting" was actually the annual Gamma Beta Phi induction banquet for new admittees.

According to undenied testimony of Dean Thornton, Plaintiff also failed to have annual service projects, as required by the national organization. Dean Thornton's undenied testimony also revealed that the annual report for 1980-81, due in June, 1981, was turned into the national headquarters several months late after the local chapter was put on probation by the national organization because of Plaintiff's failure to file the report, after an extension of time by the national organization. The chapter report ultimately turned in was, apparently, haphazardly done as it recived negative comments from the national organization.

As faculty advisor for Gamma Beta Phi, Plaintiff also neglected his responsibility to see to it that applicants who were duly elected to Gamma Beta Phi received the certificates evidenceing their election. Plaintiff claims that any delay in delivery of the certificates was due to the printer, Balfour Corporation. The preponderance of evidence indicates that this is simply not true. Plaintiff received the certificates from Balfour on August 31, 1981, and as of the last week in September, 1981, Plaintiff had failed to deliver the certificates. Some students who were inducted at the annual banquet in May, 1981, did not receive their certificates

until 1982, some as late as the summer of 1982. One student, a Mrs. Taylor who was inducted in 1980, did not receive her certificate until the summer of 1982. The local TSUD/F Gamma Beta Phi Chapter was forced to purchase other student certificates out of the chapter's treasury because these students had paid for certificates and never received them. Over 20 students complained to Dean Thornton about not receiving their certificates on time, and Dean Thornton was the one who eventually saw to it that these students received their certificates, all at extra cost to the local cahpter of Gamma beta Phi.

Other evidence indicates that Plaintiff arbitrarily denied the admission to Gamma Beta Phi of one Mr. Mixon because, Plaintiff testified, Mr. Mixon chose to go to the beach on the weekend of the banquet which was held to induct new members. Mr. Mixon's letter to Plaintiff with a copy to the administration, complaining of Plaintiff's injustice, was considered by the Faculty Advisory Committee. It showed that Mixon deserved the honor - he having all "A" grades except one "B" and that other people missed the banquet but were allowed to join the society. There being no officers, Plaintiff apparently considered that he had kingly discretion to approve or disapprove membership in Gamma beta Phi.

Dean Thornton, after receiving complaints concerning the certificates and the other problems, became concerned about the way plaintiff was handling his duties as faculty advisor to Gamma Beta Phi. Dean Thornton eventually sent Plaintiff a letter requesting that Plaintiff send him a copy of the local constitution and a list of the officers and members of Gamma Beta Phi. This memo was dated September 22, 1981. Plaintiff failed to do this. When Plaintiff failed to forward the requested information, Dean Thornton made a second request.[3] Plaintiff ignored this request also. Dean Thornton claims that Plaintiff never even gave an explanation for his failure to provide the requested information. Plaintiff claims, however, that he informed Dean Thornton that there was no local constitution

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[3] At about this time, Plaintiff send the notice, with Dr. Kirkland's November 4, 1981, memo regarding office hours attached, to all Gamma Beta Phi members requesting their intervention and support in making Dr. Kirkland quit her alleged harassment of Plaintiff.

and that the file containing the names of all Gamma Beta Phi members was in Plaintiff's office and that Dean Thornton was more than welcome to come and review that file. Plaintiff claims that he told Dean Thornton that he did not have time to review the file and compile a list of the Gamma Beta Phi members. However, Thornton testified that he made requests for similar information from other advisors of student organizations at this same time and that all of the other advisors promptly complied with his requests. Plaintiff's failure to comply with Dean Thornton's request, as well as his explanation therefor, is further evidence of Plaintiff's insubordinate attitude and disrespect for his superiors.

Dean Thornton eventually became exasperated and informed Plaintiff that he was being removed as faculty advisor for Gamma Beta Phi. To this end, Dean Thornton sent Plaintiff a memo on November 16, 1981, informing him he was being relieved and giving him the reason for his dismissal. In this memo, Dean Thornton listed two general reasons for Plaintiff's dismissal and six specific reasons. The first general reason concerning Plaintiff's three-pronged failure to follow TSUD/F guidelines and policies concerning student organizations, i.e., failure to provide a current list of officers and members and failure to provide a copy of the constitution as requested. The second general reason concerned Plaintiff's failure to maintain the purposes, projects and activities required of local Gamma Beta Phi chapters.

The specific reasons concerned Plaintiff's failure to timely file annual chapter reports with the national organization, resulting in chapter probation; failure to follow national regulations requiring annual election of officers; failure to provide new members with the materials they purchased in a timely manner; failure to hold the required number of meetings; and failure to conduct annual service projects as required. After Plaintiff was informed of his removal as faculty advisor, he told the newly-elected officers that he recommended that they resign their positions with Gamma Beta Phi, otherwise "they would be caught in the middle" of the dispute between himself and Thornton. This caused the officers to meet and discuss whether they should resign or not. All of the officers decided they would not resign. Dean Thornton and the newly-elected officers proceeded to attempt to reconstruct the affairs of Gamma Beta

Phi. The evidence, without dispute, indicates that Plaintiff left Gamma Beta Phi in a highly disorganized state.

It was approximately at this time - the end of december, 1981, and the beginning of January, 1982 - that the Gamma Beta Phi officers began to have difficulities with the local chapter's bank account at the First Alabama Bank of Dothan. The signature card for Gamma Beta Phi's checking account contained the signatures of Plaintiff and a former president so that each check was supposed to have been signed by both Plaintiff and the specified officer before it could be cashed. It appears that Plaintiff has been allowed to cash checks without the required signature of the specified officer on more than one occasion. In any event, in January, 1982, after being terminated as faculty advisor, Plaintiff sent to The First Alabama Bank of Dothan and had the funds in the Gamma Beta account frozen. Plaintiff claims he did this because he did not want to be held responsible for the money in the Gamma Beta Phi account. However, Plaintiff failed to explain why he did not communicate with his successor as faculty advisor or the president of the society or simply have his name removed from the signature card. Instead he froze the funds in the account, thereby causing a great deal of difficulty in the affairs of Gamma Beta Phi.

Shortly after this incident, in February, 1982, Plaintiff went to *The Dothan Eagle* and informed a reporter there that he was planning to sue TSUD/F and Dr. Thornton for dismissing Plaintiff as advisor to Gamma Beta Phi and for harassing him. *The Dothan Eagle* published Plaintiff's allegations in an article along with a copy of the May 4, 1981, memo concerning Plaintiff's failure to keep office hours from Dr. Kirkland. Plaintiff never filed suit over this incident, but the article in *The Dothan Eagle* did cause disharmony among the officers of Gamma Beta Phi. The officers were concerned that the adverse publicity concerning the honorary and its difficulities made the University look bad. They were worried that outsiders might conclude that the officers of Gamma Beta Phi were somehow responsible for these problems. They reconsidered their prior determinations not to resign their positions. Once again, Dean Thornton was able to convince the Gamma Beta Phi officers not to resign, despite Plaintiff's actions.

Other evidence was introduced indicating that Plaintiff may have misused funds in the Gamma Beta Phi checking

account. While he was setting up the banquet for the 1981 induction of new admittees, Plaintiff incurred many expenses for which he was reinbursed from the Gamma Beta Phi account. Plaintiff was meticulous in accounting for these expenses - perhaps too meticulous for his own good. An analysis of the honorary's records reveals some very curious things.

On his statement of expenses, Plaintiff listed expenditures he incurred in setting up the banquet, including mileage, copying expenses and a bar tab for honorary guests and speakers. Plaintiff listed the mileage round trip from Dothan to Ozark, Alabama, where the banquet was held, as being 70 miles. This was inconsistent with Plaintiff's claim in his expense statement for the 1980 banquet that the distance was 75 miles round trip.[4] What makes the mileage figures that Plaintiff claimed in both years interesting at all is that the true distance round trip from Dothan to Ozark is from 44 to 50 miles. What is even more interesting is that, on several days Plaintiff claimed mileage for going from Dothan to Ozark and back, he was required to teach classes at Fort Rucker near Ozark anyway, which means he was not entitled to mileage from Gamma Beta Phi. Perhaps the most interesting and, yet, confusing evidence concerning Plaintiff's expenses concerned an alleged $150.00 gift he recived from the Honorary.[5] Plaintiff testified that, shortly before the Gamma Beta Phi induction banquet in 1981, Plaintiff allegedly purchased some shelves, placed them in Houston Hall (the main building for the TSUD/f facility) and placed certain Gamma Beta Phi literature and material on them. Plaintiff claims that he paid about $200.00 for these shelves. When the Plaintiff first began to

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[4] Another curious factor about Plaintiff's 1980 expenses is that he waited one year until May, 1981, to receive payment for these expenses. It was strange that Plaintiff would wait this long to reinburse himself, especially in light of the meticulous expense records Plaintiff kept.

[5] Plaintiff's testimony concerning the $150.00 gift was definitely the most confusing point in the trial. While testifying on this point, Plaintiff contradicted himself more than one time. This Court has reviewed Plaintiff's testimony since the trial and is still no less confused. In light of the Plaintiff's conduct at other points in his testimony, this Court is compelled to conslude that Plaintiff was being purposely evasive concerning this alleged gift. Indeed, the Plaintiff continuously contradicted himself or had convenient lapses of memory when it seemed to his advantage throughout his four days of testimony. Needless to say, such conduct damaged his credibility in the eyes of this Court.

testify on this issue, it seemed clear to the Court that he had purchased the shelves for $200.00, turned them over to Gamma Beta Phi and then was paid $150.00 by Gamma Beta Phi for the shelves. After this testimony, however, defense counsel asked Plaintiff where the shelves were currently, noting that the shelves were not turned over to Dr. Thornton when Plaintiff accounted for the rest of Gamma Beta Phi property. Plaintiff then appeared confused, first denying knowledge of where they were, then stating that the shelves were "in a store somewhere". When defense counsel pressed this point, Plaintiff claimed that the shelves had never been given to Gamma Beta Phi; that they were purchased for Plaintiff's other business; and that they were never meant to be given to Gamma Beta Phi. Plaintiff suddenly claimed that he merely let Gamma Beta Phi use the shelves. Plaintiff claims that, as a result of his alleged generosity the members of Gamma Beta Phi voted to give him a gift of $150.00.

There are many flaws in Plaintiff's explanation about the shelves and the $150.00. Plaintiff's testimony initially indicated that the $150.00 was reinbursement for purchasing the shelves for Gamma Beta Phi to begin with and that he merely let Gamma Beta Phi borrow them. Furthermore, no concret evidence was ever presented that the shelves were actually purchased. Also, at the time Plaintiff claims the Gamma Beta Phi members voted to present him with a $150.00 gift, the honorary was without officers and had not had a meeting in quite a while, probably not in over a year, when the last banquet was held.[6] It is inconceivable that such a gift could have been authorized.

All of the evidence relating to Plaintiff's service as faculty advisor to Gamma Beta Phi indicates that he did an atrocious job

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[6] Mr. Huskey, council for Defendants, questioned Plaintiff thoroughly on this issue. The Court, seeking a more through credibility judgment abou the matter, then interrupted and examined the witness. Unfortunately, this approach did not clear the issue either. Plaintiff then requested to be given the chance to narratively explain his story. This Court refused Plaintiff's request for two reasons because the Court had interrupted the cross-examination and felt that both attorneys should be allowed to proceed unhindered with fair chances to note objections. The Court told Plaintiff that he would be given the chance to explain his story when his attorney examined him on re-direct. However, no further substantial evidence thereon was produced, and this Court remains convinced that Plaintiff was impeached by his inconsistent and incredible testimony.

in that position. His actions in freezing the account of Gamma Beta Phi were unprofessional, uncalled for and just another attempt by Plaintiff to be a troublemaker. Plaintiff was negligent in not seeing to it that Gamma Beta Phi members received their certificates on time, in not holding the recognized number of meetings per year, in not seeing to it that the required officers were elected for over two years, in failing to compile a list of the members of Gamma Beta Phi and in failing to see to it that the local chapter drafted a constitution. Plaintiff's treatment of the requests of Dr. Thornton was an example of his characteristic and consistent insubordination. Sending out the notice with Dr. Kirkland's memo attached requesting Gamma Beta Phi members to intervene and prevent Dr. Kirkland from harassing Plaintiff was very unprofessional and insubordinate. Without rehashing literally all the evidence, this court finds that the evidence relating to Plaintiff's handling of Gamma Beta Phi, in and of itself, is enough to support his termination.

18. Formenting Disharmony with Administration of the University in Writing Letters to Faculty, Specifically, the March 1, 1982, Letter. As President of the local AEA, Plaintiff occasionally sent letters to the rest of the faculty at TSUD/F discussing certain topics that were important to the faculty and staff. Plaintiff sent one such letter out on March 1, 1982. This memo gave notice that a meeting of the AEA would be held on March 4, 1982. It also discussed such legitimate topics as life insurance, retirement programs and the possibility of developing a collective bargaining procedure for the local AEA chapter. The Defendants' complaint, however, relates to the first paragraph of Plaintiff's letter. It urged the faculty to become more involved in academic and administrative decisions. It then made a degratory remark concerning Robert Milton Paul Square which is located on the TSUD/F campus. This square was named after President Paul, who was a pioneer in organizing the TSUD/F program. Specifically, the March 1 letter stated: "We can either try to follow the SACS, NCATE, and SDE mandates for more faculty participation in academic and administrative decisions, or we can all go sit on our tail-end in R(u)MPS (Robert Milton Paul Square) and accept what few crumbs the local administration will throw out way." Plaintiff claims that this was not meant to be derogratory toward President Paul. He claims that all of the faculty reeferred to the square as R(u)MPS.

However, the only evidence Plaintiff presented in support of his contention that this was the common nickname for the square was his personal assertion. True, the general message this statement conveys seems to be related to concerns that are important to the faculty. However, the evidence show that Mr. Paul was upset by Plaintiff's referring to the square named after him as R(u)MPS. He has worked many years to establish the TSUD/F complex, almost single-handedly, and had this small modest, yet attractive little square named after him for his efforts. Perhaps he was overly sensitive, but other testimony indicated that other faculty members were angered by the reference to the square as R(u)MPS. Furthermore, it is obvious that Plaintiff was attempting to uncomplimentarily compare Mr. Paul and the square named in his honor to a part of the human anatomy. When Mr. Paul read the letter, he felt it was insulting and derogratory toward him. This ridiculous ridicule of President Paul in the March 1, 1982, letter was further evidence of the Plaintiff's disegard and disrespect for his superiors. More should be expected of professional educators.

19. Sexual Impropriety. Although the notice of termination Plaintiff received on May 6, 1982, listed sexual impropriety as one of the charges for which Plaintiff was being terminated, no evidence was presented on this issue at the termination hearing. Although Dr. Kirkland and other administrators has received complaints concerning the Plaintiff's alleged sexual impropriety, none of the persons allegedly involved were available to testify before the Committee, so those charges were dismissed. Thereupon Plaintiff charged in Paragraph 34 of his complaint in this case that the defendants falsely charged him with sexual impropriety. At the trial, jowever, evidence discovered in efforts to defend against Plaintiff's claim of false sex charges demonstrated, and Plaintiff ultimately admitted sexual relations with one of his students. This court admitted evidence on this charge at trial because such evidence was relvant to the Plaintiff's demand for relief. i. e., whether or not Plaintiff would have been reinstated and to the question of whether Plaintiff would have been discharged even had he not allegedly engaged in conduct protected by the First Amendment.

The most damaging evidence to Plaintiff's case arising from this charge was an affair he admittedly had with one of his students. The undenied evidence reveals that Plaintiff was the

student's advisor and instructed her in more than one required course in her graduate school curriculum. During the fall quarter of 1978, the student was taking a practicum under the Plaintiff's tutelage. A practicum places a student in a practical environment in which she can test her skill and knowledge concerning material and situations covered in her curriculum. Although the Plaintiff was aware that the student was married and having marital problems with her husband, he nevertheless invited her to his private resident to allegedly counsel her concerning her practicum and her future curriculum. Plaintiff candidly admits that, shortly after she arrived at his home, he and the student engaged in sexual intercourse. After this sexual encounter, Plaintiff and the student engaged in sexual intercourse another five or six times. During some or all of this time, Plaintiff was apparently engaged to be married, and he eventually married the other woman. When Plaintiff announced his marriage in one of his classes, the student became very upset and ran out of the room. This incident, which came to the attention of Dr. Grimmer and some of the other administrators, aroused their suspicions.[7] Every witness who testified on this issue stated that Plaintiff's conduct in regard to the student was improper and unprofessional, including Mr. Stark, Plaintiff's own witness.

This court finds that Plaintiff's conduct was unprofessional, unthetical and highly improper. For a professor to take sexual advantage of one of his students while he is instructing that student in a required course and while that student is married and her marriage is suffering from marital difficulties, all of which the instructor is aware of, shows a lack of maturity and sound ethical judgment. Even if the Plaintiff's assertation that the initial sexual advance was mutual is true, it does not excuse this unethical behavior. As the instructor, Plaintiff held a position which carried with it a certain amount of trust, confidence and responsibility. Plaintiff should have exercised mature judgment and put a stop to the improper sexual activity well before it

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[7] Ms. Kirkland claims to have received other complaints from students concerning alleged improper sexual advances made by Plaintiff. On one occasion, a student complained to Ms. Kirkland that Plaintiff had invited her to Atlanta for the weekend. The girl informed Dean Kirkland that she felt the Plaintiff invited her on this weekend trip for sexually improper purposes.

became too involved. Plaintiff could have made steps in this direction by inviting her to his office, instead of his home. The fact that Plaintiff invited the student to his home instead of his office tends to indicate an improper motive on the Plaintiff's part. Plaintiff's sexual misconduct, as well as his other conduct heretofore discussed, demonstratees acceptable reasons why he is not a fit teacher and is not entitled to reinstatement as an equitable matter.

20. Making Misleading or Incorrect Statements to the Local News Media. This charge basically relates to an August, 1981, news article published in *The Dothan Eagle*. During the spring of 1981, the National Council for Accreditation of Teacher Education (NCATE) evaluated the professional education programs offered at TSUD/F. On June 25, 1981, Lyn Gubster, Director of NCATE, sent Dr. Ralph Adams, President of Troy State University, a letter informing him of the results of this evaluation. The letter informed that Troy State University was being denied NCATE accreditation. Copies of this letter were also sent to James Kimbrough, Dean of Education at TSUD/F, and Lloyd May, Chairman of NCATE. Plaintiff testified someone slipped a copy under his door.

The letter listed the strengths and weaknesses of the Troy State University facilities at Troy, Dothan/Ft. Rucker and Bay Minette. In one column on the right-hand side of the page, the strengths and/or weaknesses of the particular Troy State University campus being discussed were listed, and on the left-hand side the standard numbers of NCATE upon which the conclusions were based were listed.

Plaintiff claims that the letter was widely circulated on the TSUD/F campus. However, he is the only witness who claims to have received a copy of this letter through any channels. All of the other witnesses who testified on this matter stated that this letter was not widely circulated on the TSUD/F campus and that they learned of the letter after Plaintiff delivered it to *The Dothan Eagle* for publication. Defendant claim that this was a private letter to Dr. Adams and the other listed addresses, that the letter was not widely circulated and that Plaintiff some how improperly obtained a copy of this letter. It is not clear how Plaintiff received a copy of this letter, but it is clear that Plaintiff was not an addresses, had no right to a copy of the letter and

possibly obtained a copy of the letter through improper means. However, the evidence is inconclusive on exactly how the Plaintiff received a copy of this letter.

After obtaining a copy of the letter, Plaintiff proceeded to cover the left-hand column, in which the NCATE standard numbers were listed, and type his own comments concerning NCATE's conslusions in that column. Plaintiff headed this column as "Faculty Answers As to Why NCATE Noted these Weaknesses". However, the only faculty member having substantial input into these statements was the Plaintiff himself. Plaintiff then took this letter and presented it to *The Dothan Eagle*. *The Dothan Eagle* printed the letter with Plaintiff's comments in full. The article makes it appear that these comments were, in fact, truly representative faculty opinions gathered either by the Plaintiff or by an NCATE representative, who, in turn, reported the faculty opinions to the *Eagle*.

At the time this article appeared in the Eagle, most of the faculty and staff at TSUD/F had not been informed about the results of the NCATE evaluation. Infact, President Paul heard of the results of the NCATE evaluation for the first time upon reading *The Dothan Eagle* article. President Paul and other administrators who testified stated they were upset by the statements listed in the newspaper. They felt that some of these statements were unfair, especially the so-called faculty answers. The testimony reveals that they were mislead by the format of the article into believing that all of the comments and other statements in the article were NCATE's, when in fact this was not the case.

Defendants allege that many of the comments Plaintiff made were misleading and false. The Plaintiff clearly had a right to state his opinion concerning why he felt NCATE had denied the Troy State University complex accreditation. However, Plaintiff went further than this. Plaintiff also claimed to speak for the faculty of the main Troy State University campus, to which Plaintiff had absolutely no affiliation. This was improper and unprofessional. Furthermore, Plaintiff claimed to speak for the entire TSUD/F faculty, which was misleading and improper. Plaintiff's actions in improperly obtaining this letter and placing his own impersonal comments in the left-hand column of it and labeling these comments as faculty responses was improper and unprofessional. Plaintiff has no right to unilaterally claim to

speak for the entire TSUD/F faculty.

After hearing all of the evidence, the Committee members met and decided that Plaintiff should be discharged. Althrough some of the charges against Plaintiff would support his termination by themselves, the Committee did not rely on any single charge in particular to support their decision. Instead, they based their decision on the cumulative effect of all of the charges.

When the Faculty Personnel Advisory Committee reported its decision to President Paul, he discussed the charges and the evidence with Mr. Huskey, the attorney for TSUD/F, and asked whether the evidence supported the charges. Mr. Huskey informed President Paul that the charges has been supported by evidence and that the evidence supported Plaintiff's dismissal.

Mr. Paul then drafted a letter on August 31, 1982, informing Plaintiff that he concurred in the Committee's decision and that Plaintiff was effectively terminated. This letter also listed the reasons for Plaintiff's dismissal once again. However, there was a slight difference between the 20 charges listed on the May 6, 1982, notice of dismissal and on the August 31, 1982, final notice of termination. Plaintiff claims that this difference in wording somehow evidences a violation of his rights. This assertion is obviously without merit. The only substantial differences in the two letters is a failure to mention sexual impropriety in the August 31 notice.

Plaintiff has presented little evidence in support of his contention that his First Amendment rights were violated by the Defendants. As the evidence indicates, Plaintiff's superiors were relatively patient with Plaintiff's actions, almost to the point of being unreasonably patient. Plaintiff does submit evidence that he was allegedly threatened with discharge by Dr. Thornton on one occasion and by President Paul on another. However, they appeared to be trying to correct his misconduct and those threats were not carried out.

The alleged threat from Dean Thornton occurred after Plaintiff, a Mr. Calvasena and Mr. Starks released a faculty opinion survey conducted on the TSUD/F faculty.[8] This survey was very negative toward the school and the administration. After the survey was released, Dean Thornton apparently told Plaintiff that, if he had the authority, he would terminate Plaintiff,

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[8] This survey of the faculty was unrelated to the NCATE letter.

Stark and Calvasena. However, Dean Thornton did not even purport to have this authority; therefore, this threat was harmless. This was the strongest evidence presented at trial in support of Plaintiff's First Amendment claims, but it was no cause of the dismissal.

Plaintiff's claim that Paul also threatened him is unfounded. Plaintiff bases this claim on an incident that occured concerning his employment contract. Plaintiff was apparently given a 12-month contract when he first began working at TSUD/F. At some point thereafter, TSUDf reduced the regular contractual term for Plaintiff and others to ten months. TSUD/f did this due to financial considerations. Nonetheless, TSUD/F would hire more instructors for an additional two months if the schedule required it and if TSUD/F had the finances to do so. Plaintiff was one of the professors who consistently received an additional two-month contract. Beginning in 1978, Plaintiff began to attach a letter to the 10-month contract protesting that his tenure entitled him to a 12-month contract.[9] On One occasion when Plaintiff attached the letter of protest to the contract, the administration (apparently on the main campus) returned it with instructions to President Paul that Plaintiff sign the contract "as is" without protest. Paul called Plaintiff to his office and asked him to sign the contract. When the Plaintiff refused to do so, Paul informed him that he could be jeopardizing his job if he did not. This is the alleged threat; however, President Paul considered it as a statement of fact. A provision at the bottom of the contract states: "This contract is void unless accepted and returned to the University within fifteen days from the date as written above." Paul was merely reminding Plaintiff of this deadline. Plaintiff apparently signed the contract at this point and no damage occured.

Plaintiff also claimed that Calvasena, Stark and himself were discriminated against due to their involvement with the AEA and the faculty opinion survey mentioned above. Specifically, Plaintiff claims that the evidence that Mr. Stark has not been promoted for some time supports this contention. However, the evidence shows that Mr. Stark was not promoted because he did not have a terminal degree in his field. Dr. Grimmer testified that

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[9] This court has found that Plaintiff was a tenured instructor at pertinent times.

he has never recommended anyone for promotion that did not have a doctorate in his/her field. Although President Paul, who organized the campus, and a few others have been promoted to professor status without a doctorate, the evidence indicates that the general rule places great emphasis on the terminal degree. The court finds that Calvasena left TSUD/F before he was up for promotion, that Mr. Stark was not recommended for promotion because of his failure to obtain a doctorate, and that Plaintiff's habitual disregard for regulations and insubordination made promotion impossible well before his tenure became intolerable.

The Court of Appeals in *Harden v. Adams*, 760 F.2d 1158, reversed only this Court's summary judgment for Defendants Paul, Grimmer, Thornton and Kirkland in their individual capacities were affirmed. Their actions as officials of TSUD/F are, therefore, not now before the Court. As this Court understands the claims made in the Complaint and in the evidence, the Defendants' actions involved were things done by them primarily, if not entirely as officials in the scope of their authority. Activated by the complaint of Dr. Swords that something must be done about the Statement of Plaintiff to students that Dr. Swords, the chairman of Plaintiff's department, was not qualified to teach a certain course, Defendants Grimmer, Thornton and Kirkland met with others and, in their capacity as Plaintiff's superiors, concluded that they should recommend Plaintiff's discharge for a number of reasons. After that official recommendation to President Paul, they played no further part in Plaintiff's termination, in the opinion of this court.[10] Absent official authority of these three Deans, their

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[10] It is true that one or more of the defendant Deans originally charged Plaintiff with sexual misconduct based largely upon suspicious conduct. However, that charge was dismissed before the Committee hearing and was first publicized by the Plaintiff himself. Additionally, when the Plaintiff filed suit for allegedly false charges of sexual misconduct by the deans, they found undenied evidence that Plaintiff was guilty of having had sexual relations with one of his students; and, even through on December 12, 1986, Plaintiff filed an affidavit dated in July, 1983, in which he swore that he had 'never done this", referring to having made 'a sexual advance" to one of his students (pp. 5 & 6 ofPlaintiff's affidavit in support of Plaintiff's response to Defendants' Motion for Summary Judgment), the Plaintiff at the trial in this Court admitted that he had on several occasions had sexual relations with one of his students. Those admissions in open court, clearly contradicting his earlier affidavit, along with other matters mentioned herein, convince this Court that Plaintiff is unworthy of belief in a matter in which he is interested.

recommendation would have had little, if any, status. Likewise, the pleadings and the avidence against President Paul shows without contradiction that President Paul acted officially pursuant to the authority of the president of Troy State University, *Harden v. Adams,* supra, 760 F.2d at 1162, in designating the Committee, time, place and effect of the termination hearing and, thereafter, in confirming the discharge of Plaintiff as recommended by the Committee with only one dissenting vote.

CONCLUSION OF LAW

I. GOOD FAITH IMMUNITY. One defense (against the claim for damages) offered by each Defendant is that each acted in good faith and that it was reasonalbe for him or her to so act. This defense of 'good faith immunity" is available to public officials acting within the outer limits of their authority as to rights which were not, at the time of infringement thereof, clearly established statutory or constitutional rights. *Lutz v. Weld Co. School District,* 784 F.2d 340, 343; *Davis v. Scherer,* 468 U.S. 183. A review of the uncontested facts indicates that Defendants acted in the belief that their actions were appropriate and that it was reasonable for them to so believe.

I.1 Damages. This Court is of the opinion, for reasons hereinafter expressed, that the utterances here at issue did not appear to be, before the utterances, of public interest. But if they were, or became so, the law pertaining thereto did not clearly protect such statements as public utterances entitled to protection as free speech at the time in question because the interest of the public in not having the public education system disrupted appeared to have outweighed Plaintiff's interest in freedon of speech, if any. If defendants acted in good faith, and this Court is of the opinion that they reasonably did, Defendants are immune from suit for damages.

If emotional distress and damages to Plaintiff's career and reputation would have occurred if proper procedures had been used in the discharge, no recovery could be had for damages, back pay and retirement benefits lost between discharge and post-termination hearing because the proximate cause of these alleged losses was the Plaintiff's misconduct, not the Defendants' failure to properly punish him for it. *Wilson v Taylor,* 658 F.2d

1021, 1034 (11th Cir. 1981); *Carey v Piphus*, 435 U.S. 247, 260, 98 S.Ct. 1042,1046. This Court is, therefore, of the opinion that Plaintiff has not established his right to damages, back pay and related benefits by a preponderance of the evidence.

II. CHILLING OF FREE SPEECH. The Court of Appeals in this case appears to have found this Court in error "in concluding that the *Mt. Healthy* doctrine controlled" the instant case *(Harden v. Adams*, 760 F.2d 1158 (11th Cir. #84-7243, May 20, 1985, at 3724*)*, cert.den. ——U.S. ——, 106 S.Ct. 530). Although that statement may have been limited to the summary judgment context in which it appeared, this Court is left in doubt as to what doctrine it has been ordered to apply. The *Mt. Healthy* doctrine seems to be the test applied by the Eleventh Circuit court of Appeals in *Holley v. Seminole County School District*, 755 F.2d 1492, citing *Mt. Healthy*, at p. 1501, and in *Ferrara v. Mills*, 781 F.2d 1508, citing *Mt. Healthy*, at p. 1512. The rule seems to apply whether or not the teacher is tenured. As pointed out by the *Harden* opinion, Doyle was not tenured while Harden was tenured. However, both Holley and Ferrara appear to have been tenured, and the rule of *Mt. Healthly* was applied to all of them.

The Court of Appeals for the Eleventh Circuit in a recent free-speech case, *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986), pointed out that a plaintiff must first demonstrate that the speech causing his employment difficulties was both constitutionally protected and was a substantial or motivating factor in the employment decision. If establsihed, the burden then shifts to the defendant to demonstrate by a preponderance of the evidence that the action would have transpired even in the absence of the protected speech. That Court cited *Mt. Healthy City School Distrcit Bd. of Ed. v. Dayle*, supra. See, also *Berry v. bailey*, 726 F.2d 670 (11th Cir. 1984), cert.den 105 S.Ct. 2326.

The reasons for a different allocation of the burden after proof of the prima facie case of a Title VII discrimination suit (the *McDonnell-Douglas* test) discussed by the Supreme court in *Texas v. Burdine*, 450 U.S. 253-256, offer a rationale for applying the more-favorable-to-the-defendant test (*McDonnell-Douglas)* to cases somewhat dissimilar to the instant case.

The Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), pointed to the burden in employment discrimination cases as follows: The plaintiff has the

burden of proving a prima facie case: (1) that he was available for an available position; (2) that he was qualified; (3) that he was rejected under circumstances which give rise to an inference of violation of his constitutional rights. That court stated that the burden of going forward then shifts to the defendant to rebut the presumption of discrimination by articulating a legitimate constitutional reason for the termination. Thereafter, the plaintiff must have the opportunity to demonstrate and carry his burden of proof that the proffered reason was not the true reason for the employment decision. Plaintiff may do this by showing either an unconstitutional reason more likely motivated the employer or by showing that the employers's proffered explanation is unworthy of credence. The court stated that:

> "The ultimate burden of persuading the trier-of-fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. See *Board of Trustees of Keen State College v. Sweeney*, 439 U.S. 24, 25, n.2, at 29."

The employer "need not persuade the Court***. It is sufficient if the (employer's) evidence raises a genuine issue of fact as to whether it discriminated against the employee." The reason for this test is that there is a presumption of regularity and propriety in governmental action, and if there are good and bad reasons for nonemployment or discharge, the presumption favors the good reason. Cases wherein prima facie evidence of employment discrimination was held rebutted are *Hereford v. Huntsville Bd. of Ed.*, 625 F.2d 1235, 1238 (5th Cir. 1980).

The Supreme Court in Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471, recognized the rule that the plaintiff has the burden to prove that protected conduct played a "substantial part in the decision to terminate" (at pp. 285-6) and that the constitutuonally-protected conduct was a "substantial factor" or, in other words, a "motivating factor" in his discharge, and, even then, the defendant may exonerate himself by proving that the defendant would have reached the same decision even in the absence of the protected conduct. The *Mt. Healthy* Court gave as its reason that the rule of causation of a decision not to rehire which focuses solely on whether protected conduct played a part in the decision could place an employee in a better position as the result of the exercise of

constitutionally-protected conduct than he would have occupied had he done nothing. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally-protected conduct but that same candidate should not be able, by engaging in such conduct to prevent his employer from assessing his performance record and reaching a decision to discharge on the basis of that record simply because the protected conduct makes the employer more certain of the correctness of his decision.

Although the district court, writing in *Russ v. White*, 541 F. Supp. 888 (1981), was writing about a *Mt. Healthy* burden of proof and although the court was considering the derogatory statements of a dean about the president of his university, rather than those of a teacher about his superiors at TSUD/F, several well-established principles of law cited in that opion are applicatle in this proceeding.

> "'(I)t is not our function to evaluate a professor's competence nor to determine whether he any longer fits the needs of a school that is expanding its programs and attempting to upgrade the quality of its faculty. We may not so far involve this court in the discretionary decisions made by state-controlled colleges.' *Cook County College Teachers Union, Local 1600 v. Byrd*, 456 F.2d 882, 889 (7th Cir.), cert. denied, 409 U.S. 848, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972). See *Megill v. Board of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976). *** (citing *Cooper v. Ross*, 472 F. Supp. 802, 810 (E.D. Ark. 1979)).
>
> "The first question this Court must address is whether Dr. Russ was terminated for the exercise of his First Amendment rights, i.e., was terminated for expressing his opinion and criticizing certain policies and personnel of GCCC.
>
> "State colleges and universities are not cloistered institutions immune from the First amendment. *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 2345, 33 L.Ed.2d 266 (1972). Teachers do not shed their constitutional right to freedom of speech at the schoolhouse door. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

"A decision to terminate an administrator who is under contract may be made for good cause. The decision to terminate, however, may not be predicated on the faculty member's exercise of constitutionally protected rights, particularly the First amendment gauarantee of freedom of Speech. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 283-284,97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977); *Perry v. Sinderman,* 408 U.S. 593, 597-98, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972); *Shelton v. Tucker,* 364 U.S. 479, 485, 81, S.Ct. 247, 250, 5 L.Ed.2d 231 (1960); *Cooper v. Ross.* supra, at 809.

"* * *

"'(I)t is well understood that the right to free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been though to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighted by the social interest in order and morality.' *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72, 62 S.Ct. 766, 768-69, 86 L.Ed. 1031 (1942).

"* * *

"Plaintiff's conduct is similar to that found to exist in *William v. Day,* 412 F.Supp. 336 (E.D. Ark, 1976). Chief Judge Eisele found that the discharged teacher, when refused the position of athletic director, reacted as follows:

> '(H)e refused to cooperate with the administration, *failed to conform his conduct to the reasonable requirements and standards established by those above him* in the Administrative hierarchy, and generally *showed a lack of per-*

> *sonal control and respect for the attitudes and rights of others in the school "family" which ultimately created an intolerable situation for the athletic director, the principal, the superintendent, and the school board. Willaims v. Day,* supra, at 340.' (emphasis added)
>
> "* * *

"'In an administrative proceeding, *** the combination of adjudicating functions with prosecuting or investigating functions will ordinarily not constitute a denial of due process ***, and an independent inquiry by a school board prior to a formal hearing is not inconsistent with its power to hold the formal hearing'. Griggs v. Board of trustees of Merced Union High School District, 61 Cal. 2d 93, 389 P.2d 722, 726, 37 Cal.Rptr. 194 (1964). ***.

."*** As the United states Supreme court noted in *Hortonville Joint School District No. 1 v. Hartonville Educational Ass'n.*, 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1 (1976):

> 'Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker ***. Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances".'

"The *Hortonville* case is further instructive. The Supreme Court stated:

> 'A showing that the Board was "involved" in the events prededing this decision, in light of the important interest in leaving with the power given by the State Legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with desision - making power.'*Hortonville,* supra, 426 U.S. at 496, 96 S.Ct. at 2315."

Russ v. White, supra, at 895-898.

That court at 896, quoting Chief Judge Haynesworth in *Chitwood v. Feaster,* 468 F.2d 359, 361, (4th Cir. 1972), more pertinently to this case, stated that he did not intend to suggest that bickering and running disputes with the department heads were the king of speech "*** protected by the First amendment in the sense that it may not be considered in connection with the termination of the employment relationship." He continued:

> "A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his non - cooperation and aggressive conduct are verbalized." (at 361).

Judge Haynsworth, in Chitwood v. Feaster, supra, points out that, under Roth, while nontenured teachers have no such rights, a tenured teacher is entitled to a statement of reasons for his termination and an opportunity for an administrative hearing. He further pointed out that the Supreme Court in Perry v. Sinderman, 408 U.S. 593, had indicated that participations, such as in anti-war and other movements, as well as public statements critical of the college and its officials, if alleged to have been grounds for dismissal, would entitle the participants to notice and a hearing to determine whether or not an activity protected by the First Amendment was the cause of the termination of the employment relationship.

The *Russ* Court cites strong reasoning and authority (1) that courts must not substitute their judgment for the esercised discretionary decisions of college officials, except on constitutional questions; (2) that teachers have freedom of speech and other constitutional rights but that free speech does not include "fighting" words and may be outweighted by a controlling state interest; (3) that teachers must reasonably cooperate with the administration and may not, under guise of free speech, seek to undermine the reasonable administrative authority of their superiors; and (4) that due process of law in an administrative setting contemplates only that the decision - maker be capable of judging the controversy fairly on the basis of

its own circumstances. The last two criteria bar Plaintiff Harden's claims.

The parties seem to agree that the applicable rule is that, if the plaintiff proves his prima facie case ((1) a constitutionally protected speech (2) which was a substantial or motivating factor in the questioned decision) the defendant has the burden to prove that the same decision would have been made even in the absence of plaintiff's protected speech.

III. DUE PROCESS. Plantiff insists that there was evidence that Defendant Paul had made the decision to fire Plaintiff before the hearing since Defendants Paul and Kirkland both referred to Plaintiff as being terminated. However, the evidence is clear that Plaintiff was informed that the decision was subject to review by the Faculty Committee which undeniably reviewed and approved the termination by Defendant Paul. As said in *Holly v. Seminole County School District*, 755 F.2d 1492, 1499 (11th Cir. 1985), about a similar "notice of termination" by a superintendent of education to a tenured football coach:

> "Of course, (the administrators) had made a provisional determination that (the teacher's) contract would not be renewed, but that is only a logical prerequisite to the pre-termination 'good cause' hearing at which the teacher can defend against the charges." (Parenthetical expressions substituted).

While the *Holly* case may be otherwise distinguishable, it recognizes the practicalities of the process of termination of teachers including the likelehood that the administrator will have - at least provisionally - concluded that termination is appropriate. Otherwise, there would be no occasion for the hearing.

Plaintiff also claims a violation of procedural due process in this case because of the failure to give the Plaintiff a public hearing before Troy State University faculty at the Troy State University campus at Troy. Plaintiff was given written notice on May 12, 1982, that he was terminated effective June 30, 1982, and that he had a right to request a hearing thereon. The law is clear that ordinarily, if a notice is given and if the notice includes clear notice that the terminated teacher has a right to request a

hearing on his termination, the hearing must be reasonably requested by the instructor being terminated or the hearing is waived. *Fluker v. Alabama Bd. of Ed.*, 441 F.2d 201, n.1, at 203; *Sinderman v. Perry*, 430 F.2d 939, 944; *Thaw v. Board of Public Instruction*, 432 F.2d 98. It might logically be assumed, therefore, that, since the hearing automatically would be waived in the absence of a request therefor by a plaintiff, elements of the hearing, such as the right to complete the same prior to termination, the right to be heard by a particular committee, the right to challenge members of the committee and other procedural matters associated with the hearing, could also be waived by failure to object or call the matter to the appointing authority's attention at a reasonalbe time prior to the hearing. These objections concern procedural rights provided in the teachers' Manual for Troy State University at Troy which may or may not apply on other campuses. The Plaintiff was notified substantially before the hearing the composition of the committee and the fact that the hearing would be private. Plaintiff made no request or objection concerning that fact until after the committee and all witnesses had been convened for the hearing which had been continued for Plaintiff's convenience for about a week until July 7. He waived such objections by not reasonably calling them to anyone attention. No constitutional right was involved.

One of the due proces contentions of the Plaintiff is that he was not given a fair hearing because one of the members of the faculty committee who heard the evidence adverse to the Plaintiff and found that Plaintiff's discharge was appropriate was biased against the Plaintiff at the time of the hearing. Courts have recognized that administrative hearings do not afford every aspect of court-provided due process of law and that a committeeman, to violate due process because of bias or prejudice, must be shown to disclose actual bias or prejudice against the party so as to have so lost his objectivity that he no longer is able to look on the task from one party's perspective but, instead, has personalized it and converted it into something approaching a personal vendetta. *Mayberry v. Dees*, 663 F.2d 502; *Duke v. North Texas State University*, 469 F.2d 829 (5th Cir. 1972). No such loss of objectivity is evidenced in this case. In determining fairness and fullness of a hearing, the courts have sometimes looked at the length of time expended on the hearing

by the administrative body concerned. *Megill v. Board of Regents of the State of Fla.*, 541 F.2d 1073 (5th Cir. 1976). The hearing given by the Troy State committee to the Plaintiff, Dr. Harden, extended over 23 days with a transcript of almost 1500 pages and 70 documents introduced in evidence.

Plaintiff Harden claims that he was denied procedural due process because of the fact that he was not given a full hearing prior to his termination. The preponderance of the evidence shows that the timeliness of the hearing involved none of the defendants, after President Paul turned the matter over to the Faculty Advisory Committee, Defendants Kirkland, Thornton, Grimmer and Paul had no authority over when the hearing would be set, and Plaintiff did not ask their interference with the Committee's scheduling. The Chairman of the Committee originally set the hearing after receipt of the request for the hearing. Plaintiff then requested of the Committee a continuance until six days after his scheduled termination date. The Committee granted his request without objection.

Other cases held that, in certain instances, a pretermination hearing may not be necessary, particularly where important State interests are involved and a safeguard is provided the plaintiff against arbitrary State action. *Calero-Toledo v. Pearon Yacht Leasing Co.*, 416 U.S. 663. A test applied in *Mathews v. Eldridge*, 424 U.S. 319, suggests that the Court consider the private interests, including the risk of erroneous deprivation of the rights, and the probable value of a hearing against the interests of the government functions. *Mathews*, supra, at 335. It has also been held in *Riggins v. Board of Regents of the University of Nebraska*, 790 F.2d 707, that a failure to give notice of every reason for termination may not always be necessay.

The Supreme court in *Parratt v. Taylor*, 451 U.S. 527 (1981), held:

> "(T)he fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d (1965), However, as many of the above cases recognize, we have rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires a State to provide a hearing

> prior to the initial deprivation ***. This rejection is based in part on assumption that at some time a full and meaningful hearing will be available ***. The prior cases which have excused the prior-hearing requirement have rested in part on the availablity of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." *Parratt,* supra, 101 S.Ct. at 1915-1916, 451 U.S. at 540-541.

In the case of *Chung v. Park,* 514 F.2d 382 (1975), a teacher claimed that, pursuant to the due process clause, he was entitled to a hearing before any decision or determination to terminate him was reached by the administration. The Court rejected this view, stating that due process does not require that the hearing be held before the decision is made to terminate. If the procedure employed by the university fully informs a teacher of the grounds for his termination and the teacher has a full opportunity to prove to a neutral panel that his termination was unreasonable, arbitrary or capricious, then the teacher is not denied due process. The court stated the following:

> "To determine what due process is due, we have reviewed the guidelines enunciated in Morrisey V. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and *Goldbery v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), but have found nothing in these cases which suggests that the plaintiff was entitled to have a hearing prior to the decision of the college to terminate ***."

This hearing was not unreasonable, arbitrary or capricious. In *Perry v. Sinderman,* supra, the Court stated that a post-decision hearing is not inappropriate for hearings in regard to teacher terminations. See, also, *Bignall v. North Idaho College,* 538 F.2d 243 (1976) and *Vance v. Chester County Bd. of School Trustees,* 504 F.2d 820 (1974). As late as 1985, the Supreme court in *Cleveland Bd. of Ed. v. Louner Mill,* 105 S.Ct. 1487 (1985), stated that all that is required by due process is notice and an opportunity to respond.

Courts have also considered, as to the question of pretermination hearings, whether the hearing was delayed until after the determination because of some fault of the complaining party. In *Joseph v. ST. Charles Parish School Bd.,* 736 F.2d 1036

(5th Cir. 1984), the court found that the hearing was caused in part by the person whose constitutionally - protected property was being threatened and that, therefore, no due process violation occured provided the hearing was to have been held as soon as circumstances permitted. Here, Plaintiff, having received a notice of termination and of his right to a hearing from Defendant Paul, notified, not Defendant Paul but, President Adams of his request for a hearing, thereby necessitating some delay and, later, he sough and obtained another delay until about a week after his termination became effective.

In *Chung v. Park*, 512 F.2d 382 (3rd Cir. 1975), it was argued and rejected by the Court of Appeals that such a hearing did not afford plaintiff a meaningful time for, and a meaningful manner of, the hearing. *Armstrong v. Manzo*, 380 U.S. 545 (1965). See, also, *Goldberg v. Kelly*, 397 U.S. 254 (1970). Referring to Plaintiff's contentions, the court stated:

> "He would have us hold that due process *** required that a hearing be held before any decision to terminate was reached by the administration and that the burden of proof at such a hearing should have been on the administration to show the decision to terminate was justified.
>
> "Due process does not impose such strictures on professiorial pre-termination proceedings ***.
>
> "*** (W)e must here weigh the professor's interest in avoiding an unreasonable termination against the college's interest in having an efficient process for identifying and ridding itself of incompetent faculty members. *** (W)e are cognizant of the Supreme court's admonition that:
>
> > '*** By and large, public education *** is committed to the control of state and local authorities' *Epperson v. Arkansas*, 393 U.S. 97, 104, (*Chung*, supra, at 386).
>
> "Due process should not be employed to insure that this exercise of discretion is 'wise' but only that it is not unreasonable, arbitrary or capricious.' (*Chung, supra, at 387).

The court went on to hold that a hearing affording Dr. Chung full information as to the grounds for termination prior to the

hearing and a full opportunity to prove to a neutral arbitration panel that the termination was unreasonable, arbitrary or capricious was an adequate compliance with due process of law. (Chung, supra, at 387). That Court assumed, arguendo, that Dr. Chung has tenure for purposes of their decision (at 385).

The *Harden* Court, at 1167, points out that under some circumstances the failure to hold a hearing before denial of a property right does not violate due process, citing *Mathews v. Eldridge,* 424 U.S. 319 (1976). Eldridge, a Social Security recipient, was notified by the Social security Administration that his disability terminated in May, 1972. After an exchange of letters, the Social Security Administration notified Eldridge in July that his benefits would end after that month and that he had a right to State agency reconsideration within six months. Instead, he brought suit challenging the constitutionality of the procedures for terminating disability benefits and seeking reinstatement pending a hearing. Plaintiff Harden also brough suit and, later, after asking and obtaining a post-termination hearing, he complained of the post-termination hearing. That Court, after recognizing the usual requirement of a predeprival hearing, pointed out the following:

> "A claim to a predeprivation hearing as a matter of constitutional right rest on the proposition that full relief cannot be obtained at a postdeprivation hearing. (at 331).
>
> "*** (R)ecently in *Arnett v. Kennedy,* supra (416 U.S. 134) we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. *Following dismissal,* an evidentiary hearing was provided. 416 U.S. at 142-146. (at 334)(emphasis added).
>
> "*** (R)esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. (citations omitted). More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the

> private interest that will be affected by the offical; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail. See, e.g., *Goldberg v.Kelly*, supra, at 263-271. (at 334-335).
>
> "In light of the private and governmental interests at stake here and the nature of the existing procedures, we think ***" (it was error for the lower courts to hold that the post deprivation hearing was constitutionally inadequate). (at 340) (parenthetical expression added).

President Paul offered Plaintiff Harden the opportunity to ask for a hearing in early May, 1982. The hearing was originally set by the nonparty Faculty Advisory Committee chairman for June 30, 1982, nearly two months later. The plaintiff, himself, was not ready for the June 30 hearing and asked that the hearing be delayed until July 7, 1982, and it was so rescheduled. While the Faculty Advisory Committee might be subject to some criticism for not scheduling the hearing before the date for termination, no member of that committee is a Defendant in this suit, and there is no evidence that any Defendant in this suit knew of or contributed in any way to the setting of the hearing date. Certainly, Plaintiff never asked any Defendant to intercede. Suit having been filed on June 17, Defendant Paul carefully avoided contact with the Committee and almost religiously instructed the other Defendants to talk to no one about the suit or the hearing.

Mathews v. Eldridge, supra, at 335, teaches that public and private interests must be compared and the likehood of error considered. TSUD/F had an interest in continuing its program of public education including refilling Plaintiff's position on its faculty with an adequate instructor. There were students in Palintiff's courses who would (and they did) receive incomplete grades which more expediently could be completed under Plaintiff. Faculty members on the Faculty Advisory committee had to rearrange their schedules to accommodate a time for Plaintiff's hearing (ultimately from July 7 to July 29) when their

time was in demand for year-end procedures.

Plaintiff apparently had little interest in a post-deprivation hearing. His interest was in the lawsuit which was filed on the day his notice of the original date set for the hearing was mailed him by the Chairman of the Faculty Advisory Committee. His dissatisfaction with his job and his superiors therein is well documented by the undenied evidence in this case. He even asked the Committee not to commence the hearing until after his effective termination date. How he may have reacted had an earlier hearing date been set is supposition. Since he was not ready for a June 30 hearing, how can he be heard to complain that he did not get an earlier hearing? There was no showing of Plaintiff's trouble in obtaining employment or that he was otherwise damaged by the delay but that may be the result of sequestration of the damage question.

As to risk of error, Plaintiff's superiors, the Chairman of his Department, the Dean of his school, the Dean of Faculty Affairs, the Vice President for Academic Affairs and the President of TSUD/F, had all firmly expressed their opinions that Plaintiff should be discharged. This was confirmed legally by the attorney for Troy State University. They all could have been wrong, but risk of error was minimal. Additional factors (*Mathews*, supra at 335) are fairness and reliability of the pretermination procedures and the probable value, if any, of additional saleguards. Again, it is unlikely that an unanimous recommendation of those most closely associated with Plaintiff, when there were numerous complaints about him, would be unfair or unreliable and, unless the Chiarman, the President and the three other administrators are known to be unfair or unreliable by the faculty, the hearing before the Faculty Advisory Committee had little, in any, probable value to Plaintiff. The ultimate decision of the Committee, unanimous except for the dissant based, not on the failure to prove any of the charges, but on the dissenter's personal feeling that none of the charges justified dismissal, provides retrospective confirmance to the conclusion of little value. Even the dissenter testified in court that a teacher who invited a student, dependent upon him for a grade in a course required for her degree, to the teacher's home and had sexual relations with her on several occasions was highly unprofessional. Plantiff admitted, at trial, that he was guility of that conduct, throught earlier denied it and later insisted that there

was nothing wrong with it.

If Plaintiff were entitled to continued employment and benefits, the University and the Defendants reluctantly envisioned their liability therefor. They realized that a Court might disagree with their decision. This is exemplified by their having suggested 20 reasons for Plaintiff's discharge. They knew that courts may disagree as to which one or more of their reasons are trivial but insist that the question is, not whether the decision to discharge was wise, but whether it was unreasonable, arbitrary or capricious. *Epperson v. Arkansas,* supra, at 104; *Chung v. Park,* supra, at 387. They can hardly be blamed for discharging PLaintiff for every reason available when they were aware that he would litigate the issue. He had threatened suits before and had, before the discharge final on June 30, filed a suit on June 17 contesting the same. Weighting Plaintiff's interest in avoiding a termination against the University's interest in having an efficient process for identifying and ridding itself of ineffective faculty members, this Court is of the opinion that the notice and hearing given Plaintiff complied with due process of law. He was notified of the decision that he should be terminated almost two months before the effective date of termination. He requested and was given a 7-day continuance so that the hearing did not begin until after the termination. Timing of notice of faculty terminations is always problematical. Too-early notifications may be reasonably be expected to lead to loss of efficiency of instruction. Too-late notifications may lead to parties' being inadequately prepared for termination hearing and to displaced faculty members having insufficient time to seek other employment. No such claims are here made.

In any event, the evidence is undenied that none of the defendant Deans had any function or knew anything of the timing or giving of the notice of termination or the setting or extention of the time of the hearing, except that they were present for their testimony at the hearing. The evidence is equally clear and undenied that President Paul, well before the proposed hearing, dissolved his relationship with the merits of the case until the Committee's decision affirming the dismissal was reported to Paul after the hearing. Undenied evidence shows Plaintiff was informed of the composition of the original Committee some six months before the hearing and of the final

substitutions about a week before the hearing but made no objection until the date of the hearing when schedules of the members had been altered and the committee had been convened specifically to review the causes for termination. He made no complaint to Defendant Paul who could have altered the personnel on the Committee.

Plaintiff knew that Defendant Paul had appointed the Committee and presumably could change its composition and that the Committee was responsible for scheduling. Plaintiff, at the hearing before the Committee, sought to have the Committee change its own composition and from a private to a public hearing, decisions that Dr. Adams had delegated to Defendant Paul; and now, after having asked the Committee to delay the hearing until after his termination became effective, Plaintiff seeks to recover from Defendant Paul for not having afforted him a hearing before termination. No Defendant contributed to the fact that the actual hearing took place after the termination. This Court finds from clear and convincing evidence that no member of the Committee was biased or prejudiced against the Plaintiff and that the termination was not unreasonable, arbitrary or capricious. Due process was not denied the Plaintiff by any Defendant in this case. If the hearing was procedurally late, that was scheduled, not by any defendant, but by the Faculty Advisory Committee with the apparent concurrence of the Plaintiff.

The weight of authority seems to require that a procedural due process violation affords no remedy unless the victim of the violation is able to show substantial prejudice. *Joseph v St. Charles Parish School Bd.*, supra; *United States v. Lober*, 630 F.2d 335 (5hth Cir. 1980); *Arthur Murray Studio of Washington v. FTC*, 458 F.2d 622 (5th Cir. 1972). Plaintiff has shown no prejudice.

IV. FREEDOM OF SPEECH. A public employee may not be discharged without due process of law if he is a tenured employee or if his discharge is based on unconstitutional reasons such as punishment for exercising the right of freedom of speech. *Perry v. Sinderman*, 408 U.S. 593 (1972). It is clear that a government agency may not deny a benefit to a person, even if he has no legal right to that benefit, on a basis that infringes his constitutionally protected right to freedom of speech. *Pickering*

v. Board of Education, 391 U.S., 568 (1968). Involved therein is the principle of law articulated by the Supreme Court is *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708, as follows:

> "When a public employee speaks, not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personal decision taken by a public agency allegedly in reaction to the employee's behavior."

See, also, *Ferra v. Mills*, 781 F.2d 1508 (11th Cir. 1986); *Jones v State of Georgia*, 725 F.2d 622 (11th Cir. 1984); *Ballard v. Blount*, 581 F.Supp. 160 (ND Ga. 1983), affm'd. 734 F.2d 734 F.2d 1480 (11th Cir. 1980). In one of its more recent cases, *Eiland v. City of Montgomery*, supra, the Court of appeals for the Eleventh Circuit made pertinent remarks in distinguishing criticism of a superior public official made because of private interest and those commenting about matters of public interest. Eiland, a City police officer, was reassigned after he had written and published a poem disrespectful of the Mayor and other public officers of the City. Significantly, the court pointed out the following:

> "(T)he determinative factor (was) *** that the main thrust of the poem was criticism of the Mayor in the heat of a political campaign ***. Had the comments not occured in the context of the mayoral election campaign, *** our result no doubt would be different."

In balancing the factors, the Court determined that the Plaintiff's rights to freedom of speech had been infringed by the employment decision because of public interest in the elction.

The older leading cases protecting the right to public office from infringement for an employee's speaking out on public issues have long recognized the need for protecting public employees from the wrath of their superiors occasioned by exercise of freedom of speech. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court held impermissible the dismissal of a high school teacher for openly criticizing the Board

of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. In *Perry v. Sinderman*, 408 U.S. 593, the Court held impermissible the failure to rehire a teacher in the State college system who had testified before committees of the Texas Legislature and had become involved in public disagreement over whether the college should be elevated to a four-year status - - a change opposed by the regents. In *Mt. Health City Bd. of Ed v. Doyle*, 429 U.S. 274 (1977), the court questioned the failure to rehire a public school teacher who had relayed to a radio station the sustance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. All of these comments were held or implied to have been statements on matters of public interest.

On the other hand, the Supreme Court in *Connick v. Myers*, 461 U.S. (1983), held that, when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior (at 147). In that case, Ms. Myers was employed as an assistant district attorney in New Orleans with the responsibilty of trying criminal cases. When the district attorney proposed to transfer her to prosecute cases in a different section of the criminal court, she strongly opposed the transfer, expressing herself both to her other supervisors and the petitioner. Shortly thereafter, she prepared a questionnaire that she distributed to other assistant district attorney in the office, asking their opinions on office transfer policies, office morale, the need for a grievance committee, the level of confidence in supervisors and whether employees felt pressured to work in political campaigns. Before she prepared the questionnaire, she was advised by the district attorney to accept the transfer, and she stated that she would consider it. However, upon learning of her distribution of the questionnaire, the district attorney notified her that she was being terminated for refusal to accept the transfer and that her distribution of the questionnaire was considered as an act of insubordination. She brough suit claiming violation of her constitutionally protected right of free speech. The Supreme Court, recognizing that whether an

employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, held that the survey concerning confidence and trust in various supervisors, the level of office morale and the need for a grievance committee did not involve public interest and that those questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that grievance into a cause celebre (at 148). As to those three questions, the court held that the First amendment does not require a public office to be run as a round-table for employee complaints over internal office affairs. On the other hand, the court held that the question as to whether co-employees felt pressured to work in political campaigns on behalf of office - supported candidates was a matter of public interest to the community upon which it was essential that public employees be able to speak out freely without fear of retaliatory dismissal (at 149). The Court then approached the question, since the survey touched upon one matter of public concern and contributed to plaintiff's discharge, whether the district attorney was justified in discharging the plaintiff. The court pointed out that the Defendant's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. The Court noted the government's legitimate purpose in promoting efficiency and integrity in the discharge of official duties and in maintaining proper discipline in the public service, citing *Ex parte Curtis*, 106 U.S. at 373, and other cases. The *Connick* Court quoted *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974), pertinently to the instant case, as follows:

> "To this end, the government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." (at 154).

The Supreme court agreed with the district court that there was no demonstration that the questionnaire impeded the plaintiff's

ability to perform her responsibilities and that it was important to the efficient and successful operation of the district attorney's office for assistants to maintain close working relationships with their superiors (at 151). The Court stated that, when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate and that the Court did not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. However, the court noted that a stronger showing of disruption of the office and destruction of working relationships is required where the employee's speech more substantially involves matters of public concern. The court, recognizing that the question itself carried a message that the purpose of the questionnaire was to precipitate a vote of no confidence in the district attorney and his supervisors, found such a suggestive question supported the conclusion of the district attorney that the questionanaire and its distribution justified his fear that the functioning of his office was in danger (at 152). The court stated the following:

> "When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time and place in which it is delivered." (at 153).

The court also recognized that the fact that the plaintiff exercised her rights of free speech at the office supported the defendent's concerns that the function of his office was in danger. The court then accepted the district court's factual finding that the plaintiff's reluctance to accede to the transfer order was not a sufficient causein itself for her dismissal and held that, while the questionnaire touched upon matters of public concern in a most limited sense, it was most accurately characterized as an employee grievance concerning internal office policy (at 154) and that the limited First Amendment interest involved in that case does not require that the district attorney tolerate action which he reasonably believed would disrupt the office, undermine his authority and destroy close working relationships. The court, therefore, held that the plaintiff's discharge did not offend the First amendment (at 154).

The rule becomes more complicated when the decision to terminate an employee is based, not only upon a reason chilling his First Amendment right of freedom of speech, but also upon legimate reasons. This issue was decided in *Pickering,* supra, 391 U.S. at 568, in accordance with a three-step standard: The defendant's conduct must be an infringement of a First Amendent freedom; there must be a clear constitutional deprivation; and, thereafter, the defendant may as defense show that the same decision would have been reached regardless of the constitutionally - protected conduct. The first two criteria involve the first *Connick* question, i.e., whether the speech involves a public concern. The last criteria involves the *Pcikering,* question - whether the plaintiff, independently of the protected conduct, would have been discharged for legitimate reasons.

Once the questioned speech is determined to have been of public interest and to have been a motivating cause of the discharge, the court must next consider whether the speech was constitutionally protected pursuant to the so-called *Pickering*-balancing test. *Pickering v Bd. of Ed.,* supra, 391 U.S. 563. According to this test, whether a public employee's speech is contitutionally protected is determined by a balancing of the employee's interest in free speech against the State's interest in promoting the efficiency of the public services performed through its employees. *Berdin v. Duggan,* 701 F.2d 909, 912 (11th Cir. 1983). A First Amendment right may yield to a controlling State interest. For instance, a deputy sheriff's First Amendment right has been held to yield to the State's vital interest in maintaining governmental effectiveness if his private political beliefs would interfere with the discharge of his public duties. *Branti v. Finkel,* 63 L.Ed.2d 574, —— U.S. ——(1980). This limitation on First Amendment rights involves a weighing of the First Amendment right against vital government interests so closely drawn as to avoid unnecessary abridgment of First Amendment freedom, *Buckley v. Valeo,* 424 U.S. 1, 64-65; *Pickering,* supra, 391 U.S. at 568. See, also *Tanner v. McCall,* 625 F.2d 1183. Factors to weight in the balance are whether the speech is directed to people with whom the speaker would notmally be in contact during the course of his daily work, whether it had an adverse effect on discipline by intermediate supervisors or harmony among co - workers, whether the em-

ployment relationship in question is the kind for which it can persuasively be claimed that the personal loyalty and confidence are necessary to their proper finctioning and whether the statements have in any way impeded the employee's proper performance of his daily duties or interfered with the regular operations of the employer's office. *Pickering*, supra, 391 U.S. at 468-73. However, the Supreme Court has recognized that a reasonable likelihood of disruption of public services may be sufficient to support the State's interest in reasonably restricting the employee's speech. There is no necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. *Connick v. Myers*, supra, 103 S.Ct. at 1692; *McMullen v. Carson*, 754 F.2d 936, 939-940 (11th Cir. 1985). The balancing process involves the principle that a stronger showing of disruption of public administration may be necessary if the employee's speech more substantially involves matters of public concern. *Connick*, supra, 103 S.Ct. at 1698-93. Another factor involved in the balance involves the principle that, for the speech to be constitutionally protected, the speaker must exercise his privilege in a manner and at a time and place which do not unduly undermine the operation of the public employer involved. *Connick*, supra; *Pickering*, supra.

In a number of cases, the Court in considering First Amendment rights has recognized the need for balancing the private right of free speech as against the right of public institutions in promoting efficiency and harmonious relationship between and among students, faculty and administrative officials. *Pickering*, supra; *Press v. Bd of regents of the University of Ga., 489 F.Supp.150.*

The Supreme Court in Wood v. Strickland, 420 U.S. 308, 326, warned inferior courts of dangers associated with substitution of the court's judgment in educational fields for that of elected school administrators. Whata court may think is a trival reason for terminating an employee in a given field may seen very serious to one who is expert in that field. Courts have recognized a strong need for encouraging a harmonious relationship between and among students, faculty and administrative officials of educational institutions. *Roseman v. Indiana University of Pa.*, 520 F.2d 1364 (3rd cir. 1975), cert.den. 424 U.S. 921.

Plaintiff's statement about Dr. Swords interfered with the efficient and successful operation of the University, *Connick v. Myers*, 461 U.S. 138, 151. The testimony here is undenied that Dr. Swords stated he could not work with Plaintiff and that something had to be done immediately after the statements came to Swords' attention. Plaintiff's publication to students that the head of the deapartment wherein Plaintiff taught was not qualified to teach the course and that he should not be allowed to teach and his encouragement of students to file a strongly worded petition against Swords for the purpose of causing a change of the grade of all class members to "A" naturally adversely affected discipline and morale, fostered disharmony and utlimately impaired the efficiency of the eduational process at the TSUD/F campus. It was a clear act of insuboration which interfered with working relationships between Plaintiff and the chairman of his department, as well as between students and faculty. *Connick*, supra, at 151. Plaintiff's insubordination to Dr. Swords was exemplified in open Court when Plaintiff temporarily refused to admit that Dr. Swords had ever been chairman of the department. As stated in *Connick*, supra, at 152.

> "(There was no) necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action (even though a strong showing is necessary if the employee's speech involves matters of public concern."
>
> Plaintiff, like Myers, made his statement while on duty, thereby supporting the employer's fear that the functioning of his job was endangered. *Connick*, at 153. Additionally, Plaintiff made his statement in an angry voice to one or more students loudly enough to dirupt work of a secretary and another faculty member in nearby offices. Even if Plaintiff had not approved or counseled the distribution of the petition to all class members, his critical statement about Dr. Swords to students formed the basis of the circulation of the petition for the grade change. The resulting disruption has been exemplified by Dr. Swords' reaction and by the disgust echoed in the letters from one or more deploring that faculty members would burden others with their 'nitpicking".

There was little if any public interest in Plaintiff's letter criticising his dean and the administration to Gamma Beta Phi members. That letter was a direct and false insult to both the dean of Plaintiff's school and to the administration of Plaintiff's campus. It was probably written to falsely misdirect blame for the plight of Gamma Beta Phi to the administration from himself as Gamma Beta Phi faculty advisor, but it brought disharmony between the administration and some members of that organization and between himself, the dean of his school and the administration. Even through Plaintiff thereby, in October, 1981, insulted his dean and administration, he was not recommended for dismissal until May, 1982, when he insulted his department chairman. This Court is of the opinion that the minumal public interest in Plaintiff's statement about his dean and the administration was far outweighted by the public interest in a harmonious relationship among the administration, the dean in question, Plaintiff Harden (an instructor under her supervision) and the students and other members of Gamma Beta Phi. Plaintiff Harden, in this Court's opinion sought to disrupt that relationship to divert blame due himself.

Plaintiff's other claim of an exercise of free speech for which he claimed to have been punished was his "R(u)MPS" letter gratuitously offending President Paul in a letter otherwise admittedly properly seeking AEA support. While the letter probably disserved AEA because of the unprofessional, offensive reference to President Paul, it was admittedly not improper to seek the support of AEA. Considering that the letter was published only to AEA members and concerned only matters of employment interest to AEA members rather than matters of public concern, this court concludes that the letter is best characterized as involving no substantial public interest. To the extent that a public interest was served, if at all, and considering the extraneous nature of the insult to the purpose of the letter, this court is of the opinion that any public interest is outweighted by the interest of the school in an harmonious working relationship between its administration and its faculty. Accordingly, this court finds that Plaintiff has not proved by a preponderance of the evidence that any actionable First Amendment violation was committed against him.

The *Connick* court made clear that a public employee's speech is constitutionally protected only as to matters of public

concern, as distinguished from matters of merely personal interest to the employee. *Connick v. Myers,* 461 U.S. 138, 146-47 (1983). *Connick* further teaches that, whether the speech addresses public concern, must be determined by the content, form and context of the given statement, as revealed by the whole record (at 147-48). This Court is aware that, if Plaintiff Harden's statements about his superiors cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary to scrutinize the other reasons for his discharge. *Connick v. Myers,* 461 U.S. 138, 146, n. 6. While this Court is convinced that the Swords statements cannot fairly be so characterized, this Court, in the interest of finally terminating this long and expensive controversy, will attempt to address all issues.

If the speech is a substantial or motivating factor in the discharge and if it relates to a matter of public concern, then the inquiry focuses upon whether the adverse employment decision was justified, viz., whether the interest of the State in promoting the efficiency of the public services it performs through its employees outweighs the interest of the employee, as a citizen in commenting upon the matters of public concern. *Ferrara v. Mills,* 781 F.2d 1508, 1512 (11th Cir. 1986), citing *Pickering,* supra; *Connick,* supra.

The "balance" suggested by this test may fall within one of at least two sometimes interrelated categories: (1) where the speech itself interferes with the public function designed to be furnished and (2) where, even if the speech itself does not directly interfere with the designed public function, the employee would have suffered the adverse decision even if the protected speech had not been made. *Mt. Healthy,* supra. In the latter event, the interests of the designed public function would, in absence of the employment decision, suffer because one interfering with the public function in ways other than those constitutionally protected, could not, other than by the employment decision, be terminated from so interfering.

In either event, the manner, time and place of the employee's speech are factors to be weighed in the *Pickering* balance of the conmpeting employer's and employee's interest. *Ferrara v. Mills,* supra 781 F.2d at 1513; *Connick,* supra, 461 U.S. at 152. *Ferrrara,* supra, at 1515, also taught that a public employee may not transform a personal grievance into a matter of public

concern by invoking a supposed popular interest in the way public institutions are run and that particular courses an individual is assigned to teach simply cannot be viewed as a matter in which the public has a legitimate interest. These teachings were prefaced by recognition (at 1515-16) that, even through "(t)he question of what constitutes proper *** education of children is one of the most frequently debated issues in the public forum," Ferrara's criticism of collegiate registration because it interfered with his discipline of his students and his criticism of teaching assignments did not relate to public concern. Plaintiff Harden, like Ferrara, was obviously unhappy with his status at the institution where he taught. He explicity sought to degrade (1) the chairman of his department by calling him incompetent, (2) the dean of his school by implying that she had no regard for Gamma Beta Phi, (3) the president of the local campus by the interplay of the initials of the park named in his honor with an uncomplimentary portion of the body, viz., "R(u)MPS", and (4) the president and administration of Troy State University by implying in release of the NCATE letter that the faculty as a whole was in substantial disagreement with the administration and that accreditation was denied because of erroneous administrative policies. This Court has been cited to no case wherein such attempts to vilify one's superiors and the institutions and public fuctions for which one is employed has been tolerated under quise of freedom of speech.

In each case, Plaintiff awaited a moment of weakness in his adversary before launching his attack: The chairman was slightly vulnerable because of sympathy for two graduate students who would not be allowed to finish their course; the dean and the administration were vulnerable because of the disarray of the University's only honorary society when Plaintiff hoped to divert blame from himself to others; President Paul and the local administration were vulnerable because of a potential decision to eliminate the faculty from an administrative decision; and the president and other administratiors of Troy State University were vulnerable to the release of the NCATE letter because NCATE had denied accreditation when Troy State University hoped to attain it, and there would be those seeking to place the blame.

On each occasion, Plaintiff published his vilifications to persons most likely to disrupt the function of the educational

process under the circumstances: His criticism of Chairman Swords was published largely to those of Swords' students hopeful of attaining a retrospective "A" in his course; his publication of dean Kirkland's Gamma Beta Phi letter was directed to Gamma Beta Phi members then extremely disenchanted by the disarray of the affairs of the honorary society; and the NCATE letter was directed in the newspaper to the public implying fault of the administration when the attempt to be so accredited had not been publicized and the administration apparently felt the attempt to be accredited could best be repeated successfully without publicity associated with the failure.

This Court is of the opinion that the manner, time and place of each of Plaintiff's criticisms of his superiors indicate that Plaintiff was seeking to elevate himself and eliminate or degrade superiors at the expense of disruption of public education and disrepute of the institution Plaintiff was employed to serve. Plaintiff, like Ferrara (at p. 1516), may not transform his personal grievances into matters of public concern by invoking a supposed popular interest in the way public educational institutions are run. What little public concern existed before Plaintiff's publications, if any, was far outweighted by his personal interest, for whatever reason, in disrupting the public educational process at TSUD/F. Plaintiff's personal interest in his freedom of speech is far outweighed by the State's interest in not having the public educational system disrupted. This court is, therefore, of the opinion that Plaintiff's First Amendment right to freedom of speech is of no comfort to him in this case.

Plaintiff's disregard for regulations of TSUD/F and of the United State Army, whose guest Plaintiff was when teaching at Ft. Rucker, exemplify his disdain for and insubordination to the authorities over him. This disregard of established rules, particularly in presence of students, should not be tolerated. While an accasional infraction by others of rules and orders of superiors has not been considered sufficient ground for discharge, the accumulation of false statements and implications against superiors and violation of regulations and orders proved against Plaintiff clearly demands his termination if the administration is to retain any respect or authority whatsoever.

The Court of Appeals in *Harden*, supra, at 1166, n 3, suggests that a reasonable lawyer, indeed a reasonable person, should

have known that Plaintiff had a First Amendment right "which was *implicated* by the University's action,"[11] and directs a final determination as to "whether, as a matter of fact, the application of the *Mt. Healthy* doctrine to this case reders appellees *immune* from suit *** (emphasis added). This Court does not understand *Mt. Healthy* to involve the immunity doctrine. This Court assumes that the question as remainded is whether, assuming that this Court finds that Plaintiff Harden was discharged for an impermissible (unconstitutional) reason, were there "other, permissible reasons for the termination which were sufficient to support the decision." *Harden*, supra, at 1165. This Court is of the opinion for reasons hereinbefore set out that most of the 20 reasons for discharge have been proved by a preponderance of the evidence, that the circumstances surrounding the termination of Plaintiff as faculty advisor for Gamma Beta Phi and his romance with at least one of his students under the circumstances discussed infra were each sufficient cause for Plaintiff's termination. Although others occasionally have eaten in a classroom or failed to follow a class outline without being terminated, Plaintiff by his utter disregard for reasonable

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[11] Indeed, the Defendant Deans knew of and discussed the First Amendment right "implicated by the" discharge. They made their recommendation for a number of reasons which they though would be adequate seven though they contemplated some further investigation of at least some of the reasons they mentioned. President Paul got legal advice approving the action as constitutional. It cannot be the law, in the opinion of this Court, that every public official reporting a supposition, a fact or a recommendation to a superior official (who has both the duty to act thereon and the responsibility for so acting) must be liable for his true statements made in that cloistered setting. Such a rule would burden the public treasurer with attorney fees for each plateau of all public servants' participating in gathering facts upon which an ultimate decision must be made. The lawyer for the University has demonstrated in brief to this Court a number of cases which may reasonably have caused him to believe, and do cause this Court to believe, that the blatant, angry, false statment by Plaintiff that Dr. Swords, Plaintiff Harden's department chairman, was not qualified, was insubordination in rank form likely to create disharmony between Plaintiff and the chairman, was not a matter involved with the public interest and was not a matter protected by the First Amendment. See, *Chitwood v. Feaster*, 469 F.2d 361; *Arnett v. Kennedy*, 416 U.S. at 168.

regulations[12] and by his utter contempt for his immediate superiors, make it obvious that his superiors can expect disruption of the educationl processes wherever Plaintiff is involved.

V. SEXUAL MISCONDUCT. The *Holley* case, supra, is also instructive as to what issues must be decided based on the evidence presented at the administrative hearing and what issues may be considered de novo upon any evidence whether or not presented at the administrative hearing. *Holley*, supra, 755 F.2d 1501-2. It appears that this court should review the evidence presented at the Committee hearing for supportive substantial evidence, and, thereafter, if a First Amendment violation is alleged, consider de novo any evidence which may be offered to demonstrate whether or not the employer was motivated by an unconstitutional desire to discharge the Plaintiff in retaliation for

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[12] The *Harden* court pointed out at 1165 that: "Many of the stated reasons for termination were seemingly trivial (bringing food to class, not following course outlines, failing to keep appointments with students)." This Court is of the opinion that evidence offered at trial proved otherwise. The facts proved by the Defendants at trial were (1) that the prohibition of food in the classroom was in furtherance of an Army requirement concerning Army classrooms used gratuitously by TSUD/F at Ft. Rucker; (2) that all teachers at TSUD/F were required to furnish shortly after organization of a class an outline of those topics to be taught at each lecture in the course to students and to the respective deans for the purpose of letting the students know before class what subjects would be covered and so that the dean of the school involved might better have records of what was being taught at what time; and (3) that, because most of the students at TSUD/F were adults holding full-time jobs, TSUD/F has a policy of being particularly sensitive to the particular needs of the students (both financially and time wise) and requires the faculty to maintain regularly scheduled office hours at times coinciding with times available to the students. Although one violation of any one of these regulations may be "trival", the accumulation by Plaintiff of violations of regulations demonstrates an attitude which cannot be tolerated. These are violations of reasonable rules adopted to assure or facilitate a service to those seeking an education at TSUD/F. Plaintiff's unwillingness to abide by regulations demonstrates his unwillingness to offer the services to students contemplated by the administration -- a service upon which TSUD/F was built. In *Roseman v. Indiana University of Pa. in Indiana*, 520 F.2d 1364 (3rd Cir. 1975), cert.den. 424 U.S. 921, the termination of an instructor for creating disharmony between herself and the administration by criticising her department chairman to the administration and to the faculty was validated where the criticism was far less bitter than in the instant case.

his protected First Amendment activity. This court, therefore, concludes that all evidence relating to the claim of the alleged First Amendment violation, whether or not made a part of the administrative hearing, should be considered by this court in considering whether Plaintiff's First Amendment right were violated, including inter alia, whether he would have been terminated even had he not exercised his rights protected by the First Amendment. This particularly relates to the charge of sexual misconduct which is not now denied by the Plaintiff.

The evidence of sexual misconduct, not available to the Faculty Advisory committee at the administrative hearing, is relevant to several issues in this proceeding: (1) Whether as an equitable matter Plaintiff was fit to be a teacher and entitled to be reinstated; (2) whether Plaintiff was actually damaged by the decision of Dr. Paul to fire him for allegedly erroneous reasons when he should have been fired for admitted misconduct; and (3) whether the firing, if for erroneous reasons, was error without injury where he admitted sexual relations with one of the female students in his class in a required course wherein she was dependent upon him for a grade. The fact that other instructors married to and cohabiting with their students, had not been terminated does not justify preclusion of the fact that Plaintiff admittedly had sexual intercourse on five or six occasions with one of his students who was married to someone else and who was dependent upon him for a grade in a required course for a degree. An instructor is in a position to coerce improper sexual conduct not comparable to the husband - wife relationship. Answers supplied unanimously by all of the teachers except Plaintiff who testified on the subject indicate that such sexual conduct is umprofessional and untheical. Only Plaintiff testified that there was nothing wrong with such conduct. This Court is of the opion that his commission of the acts, as well as his opinion that the acts constituted no wrong, tend to show that Plaintiff was not fit to be a teacher or other leader of youth and that he would have been discharged independent of any protection he may claim under the First Amendment.

This Court, therefore, finds that Plaintiff should take nothing by his complaint herein and that judgment should be entered in favor of the Defendants.

DONE this 18th day of March, 1987.

(Signed)
UNITED STATES DISTRICT JUDGE

APPENDIX B

T. Dewey Harden, Jr.,
Plaintiff-Appellant,

v.

Ralph W. ADAMS, et al., Defendants,

Robert M. Paul, individually; Watt Grimmer, individually; William Thornton, individually, and Marjorie Kirkland, individually, Defendants-Appellees.

No. 87-7268
Non-Argument Calendar.
United States Court of Appeals
Eleventh Circuit.
April 6, 1988.

Tenured faculty member brought civil rights action against university and university officials following his termination. On appeal from grant of summary judgment in favor of all defendants, the Court of Appeals, 760 F.2d 1158, affirmed in part and reversed and remanded in part. On remand, the United States District Court for the Middle District of Alabama, No. 82-V-453-N, Robert E. Varner, J., ruled in favor of remaining defendants. On appeal, the Court of Appeals held that: (1) professor was not terminated in violation of his constitutionally guaranteed freedom of speech; (2)newly uncovered evidence of professor's sexual improprieties should not have been considered in reviewing termination; and (3) *Mt. Healthy* standard for judging teacher's First Amendment claims applied regardless of tenure status.

Affirmed.

1. Constitutional Law 90.1(7.3)

University professor was not terminated in violation of his constitutionally guaranteed freedom of speech, in light of evidence that professor fought with faculty members who were his administrative superiors and attempted to involve students in disputes centering largely around matters that were not of public concern, that professor's behavior caused disruption and disharmony among faculty, and that professor had been remiss in his duties as advisor to fraternal organization, had not kept regular office hours, and had repeadedly violated minor rules

and regulations. U.S.C.A. Const,Amends. 1, 14.

2. Civil Rights 13.13(2)

Newly uncovered evidence of university professor's sexual improprietries should not have been considered in civil rights action in reviewing professor's termination; while district court had authority to consider all evidence relating to professor's First Amendement claim, it could not conduct de novo review into his fitness to teach. U.S.C.A. Const.Amend. 1.

3. Constitutional Law 82(12)

Mt. Healthy decision of United States Supreme court, enunciating legal standard for judging First Amendment claims by public school teachers, applies regardless of teacher's tenure status. U.S.C.A. Const.Amend.1.

Appeal from the United States District Court for the Middle District of Alabama.

PER CURIAM:

In June of 1982, Dr. T. Dewey Harden, Jr., was fired from his position as professor at Troy State University's Dothan/Fort Rucker campus. The administration organized a panel of five faculty members to review the initial decision to fire Dr. Harden. The panel conducted hearings from July 7 to July 29, which lasted for more than fifty hours and produced a transcript of more than fifteen hundred pages. The panel voted 4-1 to fire Dr. Harden.

Dr. Harden believed that the university had fired him in violation of his constitutionally guaranteed freedom of speech, and brought this 42 U.S.C. §1983 (1982) action. Previously, he actively assisted the EEOC in bringing discrimination charges against the school, and helped organize a campus chapter of the Alabama Education Association. a group devoted to representing teacher's rights, on campus. These activities, he claimed, were major reasons for his termination. Dr. Harden also

sued the defendants for defamation, based on their initial accusation of sexual impropriety.[1] The trial court ruled in favor of the denfendants, and Dr. Harden appealed to this court.

(1) We find that there is sufficient evidence to support the trial court's decision, and we affirm. Based on the evidence, a reasonable factfinder could have concluded that Dr. Harden fought with faculty members who were his administrative superiors and then attempted to involve students in his disputes. There was also evidence that these disputes centered largely around matters that were not of public concern and that Dr. Harden's behavior caused disruption and disharmony among the faculty. Finally, evidence showed that Dr. Harden had been remiss in his duties as advisor to the Gamma Beta Phi fraternal organization, had not kept regular office hours, and had repeadely violated minor rules and regulations.

Sexual Impropriety Charges

Althrough we affirm the trial court's holding, we feel it necessary to discuss two points raised. The first involves the trial court's analysis of the sexual impropriety charges brought against Dr. Harden. The school initially listed Dr. Harden's sexual impropriety on one of the reasons for his dismissal; but, because there was some question about evidence sufficient to substantiate the claim, the school expressly dropped the charge prior to his termination hearing. At the termination hearing, the university presented no evidence regarding Dr. Harden's sexual conduct; and, the panel did not list sexual impropriety as one of the reason for his discharge.

Dr. Harden's sexual conduct only became an issue in this case because Dr. Harden himself raised it by claiming defamation. The defendants answered the charge by proving that their allegations were true. They obtained and presented an affidavit from a former student of Dr. Harden's stating that she had had

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[1] Harden also alleged that the university had denied him procedural due process by organizing a biased committee determined to uphold the initial decision to fire him; and he asserted that the administration had decided to fire him regardless of the panel's findings. However, we find that there is sufficient evidence to support the trial court's determination that Harden recived a fair hearing.

an affair with him. Although Dr. Harden conceded that he had slept with the student, he did not drop the claim. Instead, he insisted that his conduct had not constituted "sexual impropriety" because he had not allowed the affair to interfere with their student-teacher relationship.

(2) Although the evidence of sexual impropriety was presented solely in connection with the libel charge, the district court considered this evidence in determining whether defendants violated Dr. Harden's first amendment rights when they fired him. The trial court noted that the Eleventh Circuit has consistently encouraged district courts to conduct *de novo* reviews of first amendment claims, rather than to defer to the findings of the administrative panels that initially decided to fire the claimants. *See, e.g., Holley v. Seminole County School District,* 755 F.2d 1492, 1501-02 (11th Cir. 1985). Based on this principle, the court properly concluded that it had the authority to consider all evidence relating to Dr. Harden's first amendment claim. However, the trial court improperly determined that *Holley* also authorized it to conduct a *de novo* review into Dr. Harden's fitness to teach. The district court stated that evidence of sexual misconduct, through not considered at the administrative hearing, was relevant because: (a) it showed that Dr. Harden was unfit to be a professor; and (b) it rendered any error committed by denfendants harmless.

While we agree with the district court that sexual misconduct with students renders one unfit to serve as a teacher, considering this evidence while reviewing the "termination" is a misapplication of the legal principle discussed in *Holley. Holley* states that *de novo* is appropriate because a facially constitutional termination hearing can exist even when the termination actually occurred for an unconstitutional reason. Thus, when a plaintiff argues that "an unconsitutional result (was) reached despite procedural ... regularity and substantial evidence to support (the Board's) conclusion,'" the court may look beyond the record in investigating the truth of the claim. *Holley,* 755 F.2d at 1502 (quoting *Professional Association of College Educators v El Paso County Community College District,* 730 F.2d 258, 264 n. 9 (5th Cir.), *cert. denied,* 469 U.S. 881, 105 S.Ct. 248, 83 L.Ed.2d 186 (1984). The district court, read this case, which authorizes courts to conduct *de novo* reviews of

the *decision-making process* to guarantee that there were no constitutional violations, as one that authorized courts to re-evaluate a teacher's fitness to teach whenever that teacher claims that he or she was fired for exercising free speech rights.

We disagree with the district court's interpretation. Newly uncovered evidence regarding the claimanat's earlier conduct can never serve as a basis for the "real reason" that a board fired a professor, and so is entirely irrelevant on that issue. Therefore, the district court should not have considered this evidence in reviewing the termination.

Mt. Healthy Issue

(3) The first time the Eleventh Circuit considered this case, it found that "(t)he district court erred in concluding that the *Mt. Healthy* doctrine controlled,"[2] *Harden v. Adams*, 760 F.2d 1158, 1165 (11th Cir.), *cert.denied*, 474 U.W. 1007, 106 S.Ct. 530, 88 L.Ed2d 462 (1985). We stated: "First, that doctrine is narrower than the district court's opinion suggests.... Second, *Mt. Healthy* is distinguishable from the instant case in that the appellant there did not have tenure, a fact on which the court explicity relied in reaching its decision." *Id.* The district court interpreted this to mean that the *Mt. Healthy* test does not apply to tenured teachers. On remand, the trial judge first expressed disagreement with the circuit panel, and then stated that he did not know what standard to apply instead of *Mt. Healthy*.

We would like to clarify the issue. The district court was correct in stating taht *Mt. Healthy* applies regardless of whether a teacher has tenure. *See, e.g., Holley*, 755 F.2d at 1500 (applying *Mt. Healthy* test to evaluate tenured teahers's claim).

The current panel had also recognized this. *See Harden*, 760 F.2d at 1165 ("(R)eliance on impermissible factors does not, in and of itself, render a termination decision unconstitutional, if

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[2] In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 286, 97 S.Ct. 568, 575, 50 L.Ed.2d 471 (1977), the Supreme court reasoned that a teacher should not be able to "prevent his employer from ... reaching a decision not to rehire him based on (his performance) record, simply because the protected (conduct) makes the employer more certain of his decision." Therefore, if an employer would have fired the employee anyway, the employer's decision will not be reversed based on the employee's exercise of his or her first amendment rights.

there were other, permissable reasons for the termination which were sufficient to support the decision.") (*citing Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 285-86, 97 S.Ct. 568, 575, 50 L.Ed2d 471 (1977)).

We believe that the earlier panel had simply meant that the district court had misapplied *Mr. Healthy* by failing to apply it correctly in light of Dr. Harden's tenured status. When a teacher is tenured, "a university (must) make a considerably stronger showing than the appllees did in *Mt. Healthy*" to justify dismissal. *Harden*, 760 F.2d at 1165. Such was done here.

Conclusion

The trial court rendered a lengthy and detailed analysis of this matter. except for the minor instances discussed above, we find the record amply supports the conclusions reached for the reasons stàted.

The judgment is AFFIRMED.

APPENDIX C
UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 87-7268
Non-Argument Calendar

D. C. docket No 82-453

T. DEWEY HARDEN, JR.,

Plaintiff-Appellant,

versus

RALPH ADAMS, EDT., ET AL.

defendants,
Defendants,

ROBERT M PAUL, Individually;
WYATT GRIMMER, Individually;
WILLIAM THORNTON, individually;
and MARJORIE KIRKLAND,
individually,

Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Alabama

Before FAY, HATCHETT and ANDERSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record freom the United States District Court for the Middle District of Alabama, and was taken under submission by the court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged bu this court that the judgment of the said District court in this cause and the same is hereby, AFFIRMED;

It is further ordered plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this court.

Entered: April 6, 1988
For the Court: Miguel J. Cortez, Clerk

(Signed)
Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 87-7268

T. DEWEY HARDEN, JR.,

PLaintiff-Appellant,

versus

RALPH ADAMS, ET AL,

Defendants,

ROBERT M. PAUL, Individually;
WYATT GRIMMER, individually;
WILLIAM THORNTON, individually,
and MARJORIE KIRKLAND,
individually,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION (S) OF REHEARING IN BANC

(opinion April 6, 1988, 11 Cir., May 24, 1988.

Before FAY, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the court be polled on rehearing in banc (Rule 35, federal rules of Appellate Procedures; Eleventh circuit Rule 35-5), the Suggestion(s) of rehearing In banc are DENIED.

ENTERED FOR THE COURT:
(Signed)
United States Circuit Judge